LIBRARY
SUPREME COURT, U.S.

No. 516

RECORD

Office - Supreme Court, U.S.
FILED
SEP 30 1957
JOHN T. FEY, Clerk

United States Court of Appeals

EIGHTH CIRCUIT

No. 15,547
Civil

UNITED STATES OF AMERICA, Appellant

vs.

LATROBE CONSTRUCTION COMPANY,
BRAGG'S ELECTRIC CONSTRUCTION COMPANY
ARKANSAS FOUNDRY COMPANY
GENERAL STEEL PRODUCTS COMPANY
JEFFERY LUMBER COMPANY
PADGETT LUMBER COMPANY
CHOCTAW, INC.
IRA SHERRILL
MILL AND MINE SUPPLY COMPANY
CROW-BURLINGAME COMPANY

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

United States Court of Appeals

EIGHTH CIRCUIT

No. 15,547
Civil

UNITED STATES OF AMERICA, Appellant

vs.

LATROBE CONSTRUCTION COMPANY,
BRAGG'S ELECTRIC CONSTRUCTION COMPANY
ARKANSAS FOUNDRY COMPANY
GENERAL STEEL PRODUCTS COMPANY
JEFFERY LUMBER COMPANY
PADGETT LUMBER COMPANY
CHOCTAW, INC.
IRA SHERRILL
MILL AND MINE SUPPLY COMPANY
CROW-BURLINGAME COMPANY

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

INDEX

	Page
Complaint	1
Answer and cross-complaint of Arkansas Foundry Company	36

Page

Answer and cross-complaint of Crow-Burlingame Company 66

Answer and cross-complaint of Mill and Mine Supply Company 76

Answer and cross-complaint of Padgett Lumber Company 86

Answer and cross-complaint of General Steel Products Company 95

Answer and cross-complaint of Ira Sherrill 104

Answer and cross-complaint of Choctaw, Inc. 112

Answer and cross-complaint of Jeffery Lumber Company 120

Answer and cross-complaint of Bragg's Electric Construction Company 128

Answer and cross-complaint of Latrobe Construction Company 135

Amendment to complaint 143

Second amendment to complaint 151

Government's consolidated reply to answers and cross-complaints 158

Findings of fact and conclusions of law 162

Order appointing Receiver 168

Memorandum opinion 172

Decree 231

Narrative statement of evidence 246

Notice of appeal 252

Docket entries in United States District Court 253

(Filed in U. S. District Court January 8, 1954)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

Civil No. B-238

UNITED STATES OF AMERICA

v.

WESTMORELAND MANGANESE CORPORATION;
M. F. HIGHSMITH, President of
Westmoreland Manganese Corporation;
E. B. Blough, Treasurer of
Westmoreland Manganese Corporation;
W. H. Specht, Secretary of
Westmoreland Manganese Corporation;
STATE OF ARKANSAS, by Joe R. Cash,
Commissioner of Labor;
TRANSALL, INC.;
WESTINGHOUSE ELECTRIC SUPPLY CO.;
KOPPERS COMPANY, INC.;
TRANS WORLD AIRLINES, INC.;
CONTINENTAL GIN COMPANY;
GARDNER-DENVER CORPORATION;
IRA C. SHERRILL;
PADGETT LUMBER COMPANY;
MILL AND MINE SUPPLY COMPANY;
ARKANSAS FOUNDRY COMPANY;
JEFFERY LUMBER COMPANY;
LATROBE CONSTRUCTION COMPANY;
GENERAL STEEL PRODUCTS COMPANY;
CROW-BURLINGAME CO.;
BRAGG'S ELECTRIC CONSTRUCTION COMPANY;
CHOCTAW, INC.;
CARNEGIE INSTITUTE OF TECHNOLOGY;
and CENTRAL SCIENTIFIC COMPANY.

COMPLAINT

Comes the plaintiff, United States of America, by Osro Cobb, United States Attorney for the Eastern District of Arkansas, at the direction and by the authority of the Attorney General, and for its complaint alleges:

I

That the actions on behalf of the plaintiff, insofar as they deal with the making of the loan agreement and the execution of other contractual obligations hereinafter referred to, were taken by the Defense Materials Procurement Agency, an instrumentality of the United States government, pursuant to the Defense Production Act of 1950, Act of September 8, 1950, 64 Stat. 798, 50 U.S.C.A., App. Section 2061 *et seq.*; that the said Defense Materials Procurement Agency was abolished by Executive Order No. 10480 on August 14, 1953, and the functions, duties, and responsibilities of the said agency insofar as they pertain to this cause of action, have been transferred to, and assumed and performed by, the Administrator of General Services, for and on behalf of the General Services Administration, an agency and instrumentality of the United States government, since that date. The defendant Westmoreland Manganese Corporation is a corporation organized and existing under the laws of the State of Maryland and qualified to do business, and doing business, in the State of Arkansas; that, according to the filings made by said defendant corporation in the office of the Secretary of State for the State of Arkansas, Pulaski County has been designated as the county of the Corporation's Arkansas domicile; that the *de facto* Arkansas domicile of the said defendant Corporation is in Independence County; that the resident address of the said defendant Corporation is Batesville, Arkansas. That the defendant, M. F. Highsmith, Batesville, Arkansas, is the President of the defendant Westmoreland Manganese Corporation; that the defendant E. B. Blough, 566 Vine Street, Johnstown, Pennsylvania, is the Treasurer of the defendant Westmoreland Manganese Corporation; that the defendant, W. H. Specht, 917 Park Building, Pittsburgh, Pennsylvania, is the Secre-

tary of the defendant Westmoreland Manganese Corporation. That all other defendants named herein are either judgment creditors of the defendant Westmoreland Manganese Corporation or creditors of the said corporation holding laborers' and/or materialmen's liens, or persons, corporations, or associations which have actions pending against the defendant Westmoreland Manganese Corporation. The Court has jurisdiction of this action by virtue of Section 1345, Title 28, United States Code, and Section 2156(b), Title 50 App., United States Code.

II

That on or about the 7th day of April 1952, the Defense Materials Procurement Ageney, acting for and in behalf of the United States of America, and the defendant Westmoreland Manganese Corporation, entered into a contract, bearing the order number "GS-OOP(D)-12263", pursuant to which the United States of America agreed to purchase certain quantities of manganese ore, conforming to certain qualitative specifications from the defendant Westmoreland Manganese Corporation, at an agreed unit price, and Westmoreland Manganese Corporation agreed to produce for, and sell to, the United States of America the said ore in the quantities, according to the quality, and at the price specified. Westmoreland Manganese Corporation also agreed to begin production at the earliest possible date and that, commencing not later than the 7th day of April, 1953, production was to be at a certain average rate per month. By the terms of this contract, the defendant Westmoreland Manganese Corporation further agreed to produce the manganese ore from ore deposits owned by it and located near Cushman, Arkansas. The defendant further agreed to proceed without delay to install a washing and concentrating plant of a certain capacity, to construct necessary roads, to procure required mining and hauling equipment and, generally, to do all things necessary to meet its production obligations under the contract. For the purpose of assisting Westmoreland Manganese Corporation in the installation and construction work beforementioned, the United States of America agreed to ad-

vance sums of money in a total amount not to exceed $3,807,250.00, said advances to bear interest at the rate of 4% per annum from the date of advance and to be payable on or before January 1, 1960. Said loan was to be upon, and subject to, certain enumerated terms and conditions, among which was the provision that "upon expiration of the term of this contract, or upon prior termination of the contract, such portion of the advance payments made under the contract as have not been repaid to the government, together with accrued interest thereon, shall be immediately due and payable" (Paragraph 5(k), page 8). Funds were advanced to the defendant Westmoreland Manganese Corporation pursuant to this agreement, as more particularly set out hereinafter. A copy of said contract is attached hereto, marked Exhibit A, and made a part hereof, the original being held subject to the inspection of the parties in interest and to the orders of this Court. Said contract shall sometimes hereinafter be referred to as the "Original Letter Contract".

III

That on or about the 22nd day of May, 1952, and in pursuance of the terms of the Original Letter Contract mentioned in the last paragraph of this complaint, the defendant Westmoreland Manganese Corporation, for value received, executed its promissory "Mortgage Note" in the principal sum of Three Million Eight Hundred Seven Thousand Two Hundred Fifty Dollars and No Cents ($3,807,250.00) payable on or before January 1, 1960, with interest on the unpaid principal (computed from the date of each advance) at the rate of Four Per Cent (4%) per annum, and delivered said note to the United States of America. Said note was expressly made subject to all of the provisions of the Original Letter Contract "and any amendments thereto". Said note was also made subject to the provisions of a certain Real Estate and Chattel Mortgage and a certain Supplemental Mortgage (both of which shall be referred to in later paragraphs of this complaint) with regard to the rights of the payee thereof and the terms and conditions upon which the indebtedness represented by the said note was secured by the said mort-

gages. Said note lastly provided that the unpaid principal and interest could be declared, or become, due "on the conditions, in the manner, at the time or times, and with the effect set forth in the said mortgage, and supplement thereto, or in said letter agreement or in any agreement hereafter executed for the purpose of superseding said Letter Agreement". A copy of said Mortgage Note is attached hereto, marked Exhibit B, and made a part hereof as if set out word for word herein, the original being held subject to the inspection of the parties in interest and to the Orders of this Court.

IV

That contemporaneously with the execution of the note described above and of even date therewith, the defendant Westmoreland Manganese Corporation executed and delivered a "Real Estate and Chattel Mortgage" in favor of the United States of America as mortgagee for the purpose of securing the full and prompt payment of the said note, or any advances made thereunder, said Real Estate and Chattel Mortgage covering and mortgaging the following real and personal property, to-wit:

(Land description omitted)

E. Furniture, fixtures, machinery and equipment described as follows:

(1) Existing items of furniture, fixtures, machinery and equipment as follows:

One Caterpillar D8 Tractor, Serial No. 2U12575 equipped with 8A Bulldozer and No. 25 Cable Control 9D17134

One Willys No. 1274 Jeep

Three Gasoline-powered hoisters; 6 wheelbarrows; 9 mining tubs; 750 feet 2" black steel pipe; small two-wheel trailer;

Two sample Splitters

Weigh scales, loading ramp and miscellaneous loading equipment at Pfeiffer, Arkansas, including

5 gasoline hoists, 5 winfllass beams and 375 feet of steel cable.

Office Equipment:

10 Chairs

4 Desks

1 Typing Stand

3 Desk Lamps

1 Electric Fan

1 Typewriter

1 Steel file cabinet

(2) Furniture, fixtures, machinery, and equipment and all other personal property hereafter acquired by Mortgagor, together with all and singular the parts of and accessories to all said property, whether now belonging thereto or hereafter added thereto by way of renewal, replacement or otherwise.

F. Any and all property, real, personal or mixed or rights to property hereafter acquired by Mortgagor, including the special bank account or accounts established by Mortgagor pursuant to the agreement of April 7, 1952, between Mortgagee and Mortgagor and any amendment thereto.

Said mortgage provided, among other things, that it should constitute a first lien on the mortgaged property; that it was given to secure all amounts advanced which might become due and owing to the United States of America pursuant to the Original Letter Contract of April 7, 1952, or any amendment thereof; that mortgagor would pay all taxes and assessments and insure the insurable properties against loss due to fire, floods, windstorms, tornadoes, cyclones or other casualties usually insured against; that in case of any default in payment or performance according to any agreement contained in the note or the mortgage, or if the mortgagor should fail or refuse to perform any of the terms of the Original Letter Contract, or any amendment thereof, (page 16 of Real Estate and Chattel

Mortgage) which default, or failure or refusal by the mortgagor should continue unremedied for a period of sixty (60) days after receipt of notice from mortgagee to mortgagor specifying such default, failure or refusal, then and in that event the mortgagee could, at its option, declare the entire indebtedness immediately due and payable and that mortgagor would allow mortgagee to inspect at any reasonable time mortgagor's records pertaining to the mortgaged property. Said mortgage was properly acknowledged before a notary public in the manner prescribed by law as shown by the Acknowledgment attached thereto and one counterpart thereof filed in the Office of the Circuit Clerk and Ex-Officio Recorder for Independence County, Arkansas, on the 22nd day of May, 1952, and therein recorded in Record Book S-4 at pages 5-15 of the records of Deeds of Trust; another counterpart of said mortgage was filed in the office of the Circuit Clerk and Ex-Officio Recorder for Izard County, Arkansas, on the 22nd day of May, 1952, and therein recorded in Record Book . at page ; another counterpart of said mortgage was filed (not to be recorded) as a chattel encumbrance in the office of the Circuit Clerk of Independence County, Arkansas, on the 22nd day of May, 1952, and is now on file in said office; the last counterpart of said mortgage was filed (not to be recorded) as a chattel encumbrance in the office of the Circuit Clerk of Pulaski County, Arkansas, on the 23rd day of May, 1952, and is now on file in that office. A copy of said Real Estate and Chattel Mortgage is attached hereto, marked Exhibit C and made a part hereof, the original being held subject to the inspection of the parties in interest and to the orders of this Court.

V

That contemporaneously with the execution of the Real Estate and Chattel Mortgage mentioned above, and of even date therewith, defendant Westmoreland Manganese Corporation executed and delivered a Supplemental Mortgage in favor of the United States of America as Mortgagee for the purpose of securing the full and prompt paymnet of the Mortgagee Note mentioned above, or any ad-

vances made thereunder, but more particularly for the purpose of supplementing the provisions of the said Real Estate and Chattel Mortgage by making more explicit the description of certain properties encumbered by the said former mortgage. Said Supplemental Mortgage covers and mortgages the following property, to-wit:

(A) The manganese washing and concentrating plant now owned by Mortgagor and located in Independence County, Arkansas, approximately seven miles from the town of Cushman, together with all buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, sidings, switch tracks and all other machinery, equipment and personal property (including office equipment and automotive equipment) now or at any time hereafter comprising said plant, or used by Mortgagor in connection with the operation of said plant, or held or acquired by it for possible use in such respect.

(B) The manganese washing and concentrating plant (of an estimated daily capacity of six thousand long tons) which is to be constructed by Mortgagor and located in Independence County, Arkansas, approximately seven miles from the town of Cushman, at or near the site of the present plant mentioned in (A) aforesaid, together with all buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, slime pond facilities, sidings, switch tracks and all other machinery, equipment and personal property (including office equipment and automotive equipment) at any time hereafter comprising said plant, or used by Mortgagor in connection with the operation of said plant, or held or acquired by it for possible use in such respect.

(C) All other machinery, equipment and personal property (whether similar or dissimilar to any of the foregoing), wherever located, now owned by Mortgagor or at any time hereafter acquired by it.

(D) All land, and interests therein, located in Independence County, Arkansas, or in Izard County, Arkansas,

or in any other county within the State of Arkansas (and regardless of whether the same may or may not be specifically described in the above mentioned Real Estate and Chattel Mortgage) now owned by Mortgagor or at any time hereafter acquired by it.

(E) All interests in minerals located in, under or upon lands in Independence County, Arkansas, Izard County, Arkansas, or any other county in the State of Arkansas (the term "interests" including leasehold interests, mining and exploration rights, or the absolute ownership of minerals *in situ*), now owned by Mortgagor, regardless of whether the same may or may not be specifically described in said Real Estate and Chattel Mortgage, and all such interests at any time hereafter acquired by it.

(F) All easements, rights-of-way, franchises and privileges now owned by Mortgagor or at any time hereafter acquired by it.

(G) All ores and ore products at any time owned by the Mortgagor, whether produced from lands mined by Mortgagor or otherwise; including particularly all manganese ores produced through Mortgagor's operations.

Said Supplemental Mortgage, among other things, stated the understanding of the parties that advances under the loan were to be used for the construction of the proposed manganese washing and concentrating plant and that the lien of the mortgage would take priority over the lien of any mechanic, materialman or laborer or any other statutory lien. In said Supplemental Mortgage, the defendant Westmoreland Manganese Corporation waived all right of redemption under the Act of May 8, 1899, appearing as Section 51-1111 (this waiver being in addition to the waivers of like character contained in the aboveemen tioned Real Estate and Chattel Mortgage). Said Supplemental Mortgage was properly acknowledged before a notary public in the manner prescribed by law as shown by the Acknowledgment attached thereto, and one counterpart thereof was filed in the office of the Circuit Clerk & Ex-Officio Recorder for Independence County, Arkansas,

on the 22nd day of May, 1952, and therein recorded in Record Book S-4 at pages 5-15 of the records of Deeds of Trust; another counterpart of said mortgage was filed in the office of the Circuit Clerk & Ex-Officio Recorder for Izard County, Arkansas, on the 22nd day of May, 1952, and therein recorded in Record Book at page ; another counterpart of said Supplemental Mortgage was filed (not to be recorded) as a chattel encumbrance in the office of the Circuit Clerk of Independence County, Arkansas, on the 22nd day of May, 1952, and is now on file in that office; the last counterpart of said Supplemental Mortgage was filed (not to be recorded) as a chattel encumbrance in the office of the Circuit Clerk of Pulaski County, Arkansas, on the 23rd day of May, 1952, and is now on file in that office. A copy of said Supplemental Mortgage is attached hereto marked Exhibit D, and made a part hereof, the original being held subject to the inspection of parties in interest and the orders of this Court.

VI

That on or about the 21st day of January, 1953, the United States of America executed and delivered a Release of Part of Mortgaged Premises in favor of the defendant Westmoreland Manganese Corporation, which instrument released from the lien created by the mortgages mentioned in the last two paragraphs of this complaint the following property, situate in Independence County, State of Arkansas, to-wit:

> Part of the Southeast Quarter ($SE^1/_4$) of the Northwest Quarter ($NW^1/_4$) of Section 3, Township 14 North, Range 7 West, more particularly described as follows: Starting at the Southeast corner of the Southeast Quarter ($SE^1/_4$) of the Northwest Quarter ($NW^1/_4$) of Section 3, Township 14 North, Range 7 West; thence North along the quarter section line 59 feet to the center line of the transmission line right of way; thence North 37 degrees 50 minutes West along the center line of the transmission line 705 feet to the point of Beginning: Beginning at said point, thence South 52 degrees 10 minutes West

250 feet; thence North 37 degrees 50 minutes West 375 feet to the center of the County Road; thence North 66 degrees 35 minutes East along the center line of the Road 361.4 feet; thence South 37 degrees 50 minutes East 285 feet; thence South 52 degrees 10 minutes West 100 feet to the point of Beginning, containing 2.65 acres, more or less.

A copy of this Release of Part of Mortgaged Premises is attached hereto, marked Exhibit E and made a part hereof. On or about the 26th day of January, 1953, the defendant Westmoreland Manganese Corporation executed and delivered a Quitclaim Deed in favor of the Arkansas Power and Light Company covering the property described in this paragraph. A copy of this Quitclaim Deed is attached hereto, marked Exhibit F, and made a part hereof as if set out word for word herein.

VII

Subsequent to the date of the Real Estate and Chattel Mortgage and Supplemental Mortgage heretofore referred to, defendant Westmoreland Manganese Corporation received certain interests in certain real property, which interests are encumbered under the after-acquired property provisions of the said mortgage instruments, to-wit:

A. On or about the 13th day of January, 1953, P. G. Shook and W. H. Neal, Trustees for Shook & Fletcher Supply Company, a corporation, and Sloss-Sheffield steel and Iron Company, a corporation, executed and delivered a Right-of-Way Deed to defendant Westmoreland Manganese Corporation granting an easement to a strip of land 100 feet wide over, upon, and across the following described land:

The Southeast Quarter of the NW^1_4, Section 36, Township 15 North, Range 7 West, Independence County, Arkansas.

Said Right-of-Way Deed is recorded in Book Q-6, pages 29-31 of the Records of Deeds, Independence County, Arkansas.

B. On or about the 15th day of January, 1953, E. J. Baxter and Ella Baxter granted an easement over a part of the S½ of the NE¼ and the N½ of the SE¼ of Section 36, Township 15 North, Range 7 West, as more particularly described in Book Q-6, page 51, Records of Deeds, Independence County, Arkansas. This Complaint will be amended to include an accurate description of this property as soon as said description is secured by the plaintiff.

C. On or about the 13th day of August, 1952, S. L. McDaniel and Essie McDaniel, his wife, conveyed to the defendant Westmoreland Manganese Corporation by warranty deed the following described property:

> All that part of the NE¼ of the NW¼, Section 31, Township 15 North, Range 6 West, lying South of Cushman-Sandtown-Cave City Road, Independence County, Arkansas,

said deed being filed for record on the 24th day of October, 1952, and being recorded in Book L-6, page 157, Deed Records, Independence County, Arkansas.

D. On an unspecified day in September, 1952, S. L. McDaniel and Essie McDaniel, his wife, conveyed to the defendant Westmoreland Manganese Corporation by warranty deed the following described property:

> A 5-acre tract of land in the shape of a square in the NE corner of the NW¼ of the NW fractional ¼, Section 31, Township 15 North, Range 6 West; this being the same tract of land which was reserved to the grantor in a deed to grantee dated December 14, 1951, and recorded in Book O-6, page 163, Deed Records of Independence County, Arkansas.

This warranty deed was filed on the 24th day of October, 1952, and recorded in Book R-6, page 159, Deed Records, Independence County, Arkansas.

VIII

That on the 2nd day of April, 1953, it had become apparent that the defendant Westmoreland Manganese Corporation would be unable to complete the facilities and to

begin production of manganese ore within the time provided in said Original Letter Agreement and would therefore be in default, and that said default would constitute a breach of said contract. That on or about the date abovementioned, the United States of America, acting by and through the Defense Materials Procurement Agency, and the Westmoreland Manganese Corporation entered into and executed an agreement entitled "Amendment No. 1 to Letter Order No. GS-OOP(D)-12263", (this Letter Order also being referred to herein as the Original Letter Contract), whereby the defendant Westmoreland Manganese Corporation agreed to place the facilities on a temporary stand-by basis and to preserve the facilities from the elements, theft, and damage, and the United States of America agreed to make further advances for this purpose. The said Amendment No. 1 also provided, among other things, that the United States of America would make further advances to enable Westmoreland Manganese Corporation to meet certain of its outstanding accrued obligations. That pursuant to said Amendment No. 1, the plaintiff, acting through the Defense Materials Procurement Agency, made advances after April 2, 1953, for the purposes outlined in said Amendment. Said Amendment further provided:

> "3. Notwithstanding any provision in the Contract to the contrary, the Contractor hereby grants to the Government the unqualified right and privilege of terminating the Contract at any time in the future up to commencement of production upon determination by the Government that termination of the Contract is in the best interest of the Government; the Contractor shall take no legal action to prevent such termination of the Contract by the Government, and disclaims any and all recourse by reason of such termination by the Government.
>
> 4. Under the terms of a mortgage instrument made by the Contractor to the Government on May 22, 1952, pursuant to the terms of the Contract, it is provided that the Contractor shall have sixty (60) days from notice to remedy the Contractor's failure

or refusal to perform any covenant, agreement or condition in the Contract, note or mortgage as a condition precedent to foreclosure. Contractor hereby waives the sixty-day period granted by said mortgage within which to remedy the breach, and agrees that henceforth all moratorium provisions contained in said mortgage shall be without force and effect, and in the event of termination of the Contract as provided in paragraph 3 hereof, the Contractor shall, on demand of the Government, grant the Government immediate possession of the facilities, with the right to use the facilities in place or off-site, either directly or by contract, and the Government may lease and dispose of such facilities, provided, however, that nothing herein contained shall prejudice or impair the right of the Contractor to an accounting. Contractor shall, at the request of the Government, execute, deliver and record a supplemental mortgage under the terms of which the aforesaid sixty-day moratorium provisions shall be deleted from the original recorded mortgage."

A copy of said Amendment No. 1 is hereto attached, marked Exhibit G and made a part hereof, the original being held subject to the inspection of the parties at interest and to the orders of this Court.

IX

A. That certain defendants claim an interest in the mortgaged property, or certain portions thereof, based on judgments which they have against defendant Westmoreland Manganese Corporation, as follows:

1. Defendant Joe R. Cash, Commissioner of Labor, acting for and on behalf of the State of Arkansas, by virtue of a Certificate of Assessment filed on the 16th day of September, 1953, and abstracted in Judgment Record Book "H", page 50, of the Circuit and Chancery Court Records of Independence County, Arkansas.

2. Defendant Transall, Inc., by virtue of a judgment rendered by the Circuit Court, Independence County, Arkansas, on the 26th day of October, 1953, in case styled *Transall, Inc., Plaintiff* v. *Westmoreland Manganese Corporation, Defendant*, for the sum of Four Thousand Four Hundred Ninety-Nine Dollars and Six Cents ($4,499.06), plus costs in the amount of Twelve Dollars and Fifty-Five Cents ($12.55), which judgment is abstracted in Judgment Record Book "H" at page 52, and recorded in Book "V", page 232, of the Circuit Court Records of Independence County, Arkansas.

3. Defendant Westinghouse Electric Supply Company, by virtue of a judgment rendered by the Circuit Court, Independence County, Arkansas, on the 26th day of October, 1953, in case styled *Westinghouse Electric Supply Company, Plaintiff* v. *Westmoreland Manganese Corporation, Defendant*, for the sum of One Thousand Seven Hundred Eighty-Four Dollars and Three Cents ($1,784.03), plus costs in the amount of Eight Dollars and Fifty-Five Cents ($8.55), which judgment is abstracted in Judgment Record Book "H", page 52, and recorded in Book "V", page 234, of the Circuit Court Records of Independence County, Arkansas.

4. Defendant Koppers Company, Inc., by virtue of a judgment rendered by the Circuit Court, Independence County, Arkansas, on the 26th day of October, 1953, in case styled *Koppers Company, Inc., Plaintiff* v. *Westmoreland Manganese Corporation, Defendant*, for the sum of Four Hundred Thirty-Four Dollars and Twenty-Two Cents ($434.22), plus costs in the amount of Eight Dollars and Seventy Cents ($8.70), which judgment is abstracted in Judgment Record Book "H", page 53, and recorded in Book "V" at page 231, of the Circuit Court Records of Independence County, Arkansas.

5. Defendant Trans World Airlines, Inc., by virtue of a judgment rendered by the Circuit Court,

Independence County, Arkansas, on the 26th day of October, 1953, in case styled *Trans World Airlines, Inc., Plaintiff* v. *Westmoreland Manganese Corporation, Defendant*, for the sum of Seven Hundred Thirty-Eight Dollars and Eighty-One Cents ($738.81), plus costs in the amount of Seven Dollars and Twenty-Five Cents ($7.25), which judgment is abstracted in Judgment Record Book "H", page 53, and recorded in Book "V", page 233, of the Circuit Court Records of Independence County, Arkansas.

6. Defendant Continental Gin Company, by virtue of a judgment rendered by the Circuit Court, Independence County, Arkansas, on the 26th day of October, 1953, in case styled *Continental Gin Company, Plaintiff* (Birmingham 2, Alabama) v. *Westmoreland Manganese Corporation, Defendant*, for the sum of Forty Thousand Seven Hundred Twenty-Seven Dollars and Seventy-Six Cents ($40,727.76), plus costs in the amount of Twelve Dollars and Eighty-Five Cents ($12.85), which judgment is abstractsd in Judgment Record Book "H", page 530, and recorded in Book "V", page 231, of the Circuit Court Records of Independence County, Arkansas.

7. Defendant Gardner-Denver Corp., by virtue of a judgment rendered by the Circuit Court, Independence County, Arkansas, on the 26th day of October, 1953, in case styled *Gardner-Denver Corp.* v. *Westmoreland Manganese Corporation*, for the sum of Four Hundred Fifty-Eight Dollars and No Cents ($458.00) plus costs in an unknown amount, which judgment is abstracted in Judgment Record Book "H", at page 55, and recorded in Book "V", at page 243, of the Circuit Court Records of Independence County, Arkansas.

B. That certain defendants claim some interest in the mortgaged property, or certain portions thereof, based on mechanic's and or materialmen's liens filed against the

defendant Westmoreland Manganese Corporation, as follows:

1. Defendant Ira B. Sherrill, by virtue of a materialmen's lien filed on the 9th day of April, 1953, and amendment thereto filed on the 6th day of May, 1953, in the amount of Three Hundred Sixty-Two Dollars and Fifty Cents ($362.50);

2. Defendant Padgett Lumber Co., by virtue of a materialmen's lien filed on the 17th day of April, 1953, and amendment thereto filed on the 6th day of May, 1953, in an amount unknown to plaintiff.

3. Defendant Mill & Mine Supply Co., by virtue of a materialmen's lien filed on the 24th day of April, 1953, in the amount of Eight Thousand Three Hundred Twelve Dollars and Sixty-Nine Cents ($8,312.69);

4. Defendant Arkansas Foundry Company, by virtue of a materialmen's lien filed on a date unknown to plaintiff in the amount of Forty-Nine Thousand Two Hundred Sixty-Seven Dollars and Ninety-Six Cents ($49,267.96);

5. Defendant Jeffery Lumber Company, by virtue of a materialmen's lien filed on the 4th day of May, 1953, in the amount of Two Thousand One Hundred Fifty-Seven Dollars and Fifty-Five Cents ($2,157.55);

6. Defendant Latrobe Construction Company, by virtue of a labor and materialmen's lien filed on the 9th day of May, 1953, in the amount of Three Hundred Fourteen Thousand Four Hundred Seventy-One Dollars and Thirty-Three Cents ($314,471.33);

7. Defendant General Steel Products Company by virtue of a materialmen's lien filed on the 25th day of May, 1953, in the amount of Fifteen Thousand Nine Hundred Twenty-Five Dollars and Sixty-Two Cents ($15,925.62);

8. Defendant Crow-Burlingame Company by virtue of a materialmen's lien filed on the first day of June, 1953, in the amount of Four Thousand Three Hundred Sixty-Six Dollars and Twelve Cents ($4,366.12);

9. Defendant Bragg's Electric Construction Co., by virtue of a labor and materialmen's lien filed on the 2nd day of June, 1953, in the amount of Fifteen Thousand Seven Hundred Dollars and Thirteen Cents ($15,700.13);

10. Defendant Choctaw, Inc., by virtue of a materialmen's lien filed on the 8th day of August, 1953, in the amount of Three Thousand Eighty-Six Dollars and Twenty-Nine Cents ($3,086.29);

C. That certain defendants herein may be asserting some claim to the mortgaged property, or portions thereof, by virtue of certain suits which they have commenced against the defendant Westmoreland Manganese Corporation, which actions are now pending, as follows:

1. Defendant Carnegie Institute of Technology filed a complaint on the 23rd day of November, 1953, in the Circuit Court of Independence County, Arkansas in an action styled *Carnegie Institute of Technology* v. *Westmoreland Manganese Corporation*;

2. Defendant Central Scientific Company filed a complaint on the 24th day of November, 1953, in an action styled *Central Scientific Company, a Corporation* v. *Westmoreland Manganese Corporation* in the Municipal Court of Batesville, Arkansas.

All rights of the defendants named in sub-paragraphs A, B, and C of this paragraph IX in and to the property mortgaged to the plaintiff are subsequent, inferior, and subordinate to the rights of the United States of America under the Real Estate and Chattel Mortgage and the Supplemental Mortgage mentioned hereinabove.

X

That plaintiff's demand for permission to take an inventory has been refused by the defendant Westmoreland Manganese Corporation, and the plaintiff is without information necessary to describe accurately all of the property acquired by the defendant since the date of the execution of the beforementioned Real Estate and Chattel Mortgage and the beforementioned Supplemental Mortgage, which after-acquired property is as much a part of the security under said mortgages as the property specifically described therein, and which property it is the purpose of this action to foreclose, in addition to the said particularly described property. This complaint will be amended to include all of said after-acquired property by specific description as soon as plaintiff has secured an inventory of said properties.

XI

Pursuant to the provisions of paragraph 3 of Amendment No. 1 to Letter Order No. GS-OOP(D)-12263, and subsequent to the execution of said Amendment and prior to the commencement of production of manganese ore, the plaintiff determined that a termination of the contract was in the best interest of the government, terminated same, and on or about the 29th day of October, 1953, notified the defendant Westmoreland Manganese Corporation of the said termination. The advances made under the contract in the amounts hereinafter set out had not been repaid to the government at the date of said termination and immediately became due and payable. The defendant Westmoreland Manganese Corporation has not paid said advancements or any part thereof, and said advancements (with the interest accrued thereon) are now due, payable, and owing to the plaintiff herein, the maturity thereof having been accelerated by reason of the termination of said contract.

XII

That on or about the 6th day of January, 1954, the United States of America, plaintiff herein, made further demand upon the defendant Westmoreland Manganese

Corporation for payment of all amounts advanced pursuant to the Mortgage Note and other instruments heretofore set out, together with the interest due thereon, although said demand was not necessary because of the financial condition of said defendant. Said demand for payment was refused and denied by Mr. H. F. Highsmith, President of defendant Westmoreland Manganese Corporation, acting for and on behalf of said defendant corporation.

XIII

That pursuant to the Original Letter Contract, Amendment No. 1 thereto and the Mortgage Note executed by the defendant Westmoreland Manganese Corporation, the plaintiff has advanced as of the date of this complaint the principal sum of Two Million Eight Hundred Seventy-Six Thousand Four Hundred Ninety-Eight Dollars and Seventy-One Cents ($2,876,498.71) and interest has accrued thereon as of the date of this complaint in the amount of One Hundred Fifty-Nine Thousand Six Hundred Thirty-Five Dollars and Seven Cents ($159,635.07), on which interest accumulates daily at the rate of Three Hundred Fifteen Dollars and Twenty-Three Cents ($315.23). No payment of either principal or interest has been made by the defendant Westmoreland Manganese Corporation on this indebtedness, and the total amount is now due and payable to the plaintfif.

XIV

That among the personal property belonging to the defendant Westmoreland Manganese Corporation, and upon which the plaintiff herein has a lien by virtue of the instruments pleaded hereinabove, are many pieces of machinery and equipment having a value of several hundred thousand dollars; that the defendant Westmoreland Manganese Corporation has failed and refused, and still fails and refuses, and is financially unable, to employ standard methods for the preservation of the mortgaged facilities and properties from the elements, theft, and damage, and said machinery and equipment, and the improvements and facilities are deteriorating and suffering extensive damage; that unless immediate possession of the

said facilities, improvements, machinery, and equipment is transferred to a receiver appointed by this Court, said facilities, improvements, machinery, and equipment will further deteriorate and be further damaged; that certain of the aforementioned properties are in danger of being lost, removed, and/or materially injured; that the defendant Westmoreland Manganese Corporation has permitted judgments to be taken against it and liens to accrue in sums exceeding several hundred thousand dallars, and there are now filed against said defendant other claims in substantial amounts; that said defendant is insolvent and unable to respond in damages to the plaintiff for its failure to preserve the mortgaged facilities; that the property covered by the mortgages foreclosed upon herein is insufficient to pay the judgment to which the plaintiff is entitled and that the defendant Westmoreland Manganese Corporation bas no funds to pay any deficiency assessed against it, and therefore the government will suffer irreparable damage unless said Receiver is appointed by this Court; that, as pleaded above, it is necessary that an inventory be taken of the assets and properties belonging to the defendant Westmoreland Manganese Corporation for the purpose of providing information upon which an accurate description of the property intended to be foreclosed hereby can be based and that it will be necessary for this Court to appoint a Receiver to make the said inventory and to ascertain the date and terms of acquisition of all after-acquired property, to preserve and maintain all of the property of the defendant located in Arkansas and or covered by the mortgages hereinabove referred to, pending the final determination of this action on its merits.

Wherefore, plaintiff prays judgment against the defendant, Westmoreland Manganese Corporation, in the sum of $2,876,498.71 as principal, and in the sum of $159,635.07 as interest, computed through the 7th day of January, 1954, together with interest on the aforementioned principal at the rate of 4% per annum from the said 7th day of January, 1954, until date of the judgment rendered herein; with interest on the total amount of said judgment from the date of said judgment at the rate of 6% per annum until paid; and for any additional sums

which plaintiff may be forced to pay to protect its security, pending final decree; that said judgment be decreed to be a first, prior and paramount lien on the land and personal property encumbered by the Real Estate and Chattel Mortgage and the Supplemental Mortgage beforementioned; and that if the said judgment be not paid within a reasonable time, to be fixed by this Court, a Commissioner be appointed to sell said real and personal property to satisfy said judgment; that the purchaser at any sale of said property be decreed to have the right to immediate possession of said lands and property, with the rents and profits therefrom, from the date of said sale; that all right and equity of redemption of the defendants, and each of them, be foreclosed and forever barred; that a Receiver Pendente Lite be appointed to immediately take charge and possession of said properties, to manage, conserve and protect same, to pay all taxes and insurance, to make all necessary repairs and carry on all necessary maintenance, to bring into his possession all properties mortgaged to the plaintiff, and to, generally, hold the said properties subject to the orders of this Court, pending final determination of this cause on its merits; for all costs herein expended and for all other proper relief to which plaintiff is entitled, either in law or in equity.

UNITED STATES OF AMERICA

/s/ OSRO COBB
United States Attorney

/s/ G. THOMAS EISELE
Assistant United States Attorney

DEFENSE MATERIALS PROCUREMENT AGENCY

EXHIBIT A

WASHINGTON 25, D. C.

April 7, 1952
GS-OOP(D)-12263

Westmoreland Manganese Corporation
Batesville, Arkansas.

Gentlemen:

1. The United States of America, acting through the Defense Materials Procurement Agency (hereinafter re-

ferred to as the "Government"), proposes to enter into a formal contract with you which will provide for the production and disposition by you of 264,000 long dry tons of manganese ore estimated to contain 12,000,000 long ton units of manganese conforming to National Stockpile Specification P-30, latest revision as of the date hereof. As used herein, a long ton unit of manganese means 22.4 pounds of manganese. You shall begin such production as soon as possible and commencing not later than twelve (12) months from the date of your acceptance of this order such production shall be at an average rate of 2,000 long dry tons per month during the first four months of operation, and continue thereafter at an average rate of 47,250 long dry tons per year. For the purpose of this order, production shall be deemed to have commenced with the first twenty-four hour day on which 1,000 long wet tons of mine-run ore are processed through the washing and concentrating plant, which you will provide in accordance with paragraph 2 hereof.

2. The ore to be mined hereunder shall be produced from ore deposits owned by you, located near Cushman, Arkansas, which you estimate contain recoverable ore in excess of 600,000 long dry tons, averaging forty-six percent (46%) manganese. Upon your acceptance of this order you will proceed without delay with the development, equipment, and preparation of the above-named property for the production of manganese ore at the rate required to meet your obligations hereunder, including but not restricted to the installation of a washing and concentrating plant of 6,000 long tons per day capacity, the construction of necessary roads, the procurement of required mining and hauling equipment, and necessary related facilities for the production and processing of manganese ore, and you will make such contracts and commitments for supplies and services as are necessary therefor. In addition, if and when the slime pond presently proposed to be used for the deposit of clay and other waste material from the milling operation is found to be inadequate to contain the waste material produced during the terms of this agreement, you will construct a second slime pond, and provide pumping

and other necessary facilities therefor (such project being hereinafter referred to as the "second slime pond"), the cost of which is estimated to be not in excess of $155,000, and the capacity of the second slime pond to be only that necessary to store the waste material estimated to be produced during that portion of the contract term for which there is no capacity for storage remaining in the first slime pond. If you elect to construct such second slime pond, at a cost which exceeds $155,000, or with a capacity greater than that needed for the purpose indicated, the additional funds necessary for such construction shall be provided by you from sources other than those specified in paragraph 5 hereafter. All of the property and equipment described in this paragraph 2 shall hereinafter be referred to as the "facilities". The mine-run ore from your aforesaid ore deposits will be used by you, as produced, in the production of the manganese ore called for herein.

3. (a) All of the manganese ore produced hereunder, up to but not in excess of 264,000 long dry tons, shall be sold to and purchased by the Government.

(b) You will notify the Government not later than the tenth day of each month as to the estimated quantity of ore to be delivered to the Government during the succeeding month. All manganese ore purchased by the Government hereunder shall be delivered f.o.b. railroad cars Cushman, Arkansas. With respect to such deliveries, you shall without any charge to the Government act as forwarding agent and make all shipments in accordance with instructions to be furnished by the Government.

4. The prices per long ton unit of manganese (hereinafter referred to as "unit") contained in the manganese ore sold to the Government hereunder and delivered f.o.b. railroad cars at Cushman, Arkansas, shall be as follows:

(a) During the first four months of production hereunder or until 8,000 long tons of manganese ore are produced, whichever occurs earlier, for Types I and III ore, more particularly described in National Stockpile Specification P-30, referred to in paragraph 1 hereof, $1.72 per unit, and for Type II, $1.67 per unit.

(b) During the next succeeding six (6) months' period, for Type I and Type III ore, $1.42 per unit, and for Type II, $1.37 per unit.

(c) During the next succeeding twelve (12) months' period, the price per unit shall be as provided in subparagraphs (b) and (c) hereof, adjusted by that amount which represents the difference between the presently estimated total operating costs, per unit, as set forth below, (including administration and other overhead costs, but excluding interest, depreciation, State and local taxes) and the total average actual operating costs per unit for such items incurred during the six (6) months' period referred to in subparagraph (b) hereof, such total average actual operating costs shall be determined by an independent certified public accountant after audit as provided in paragraph 8 (b) hereof. Such adjusted unit price shall be maintained without change, except as otherwise provided in subparagraphs (f) and (g) hereof, during this twelve (12) months' period; provided, however, that if the total average actual operating costs per unit during said six (6) months' period are lower than the presently estimated total operating costs per unit, the price per unit shall be reduced during said twelve (12) months' period by seventy-five percent (75%) of the difference. For the purpose of this subparagraph (c) the presently estimated operating costs per unit are as follows:

Stripping	$0.166
Mining	0.141
Hauling	0.313
Milling	0.190
Drilling	0.022
Road Maintenance	0.017
Administrative and Overhead	0.041
Total	$0.890

In determining the actual cost of operation during the six (6) month and twelve (12) month periods specified hereinabove, salaries of corporate officers, as such, aggregating in excess of $10,000 per year will not be included.

(d) Thereafter, and for the duration of the balance of the contract, the price per unit shall be as provided in subparagraphs (b) and (c) hereof, adjusted by that amount which represents the difference between the presently estimated total operating costs per unit, as set forth below, (including administration and other overhead costs, but excluding interest, depreciation, State and local taxes) and the total average actual operating costs per unit for such items incurred during the twelve (12) months' period referred to in subparagraph (c) hereof, such total average actual operating costs shall be determined by an independent certified public accountant after audit as provided in paragraph 8 (b) hereof. Such adjusted unit price shall be maintained without change, except as otherwise provided in subparagraphs (f), (g) and (i) hereof, during the balance of this contract, provided, however, that if the total average actual operating costs per unit during said twelve (12) month period are lower than the presently estimated total operating costs per unit, the price per unit shall be reduced during the balance of this contract by seventy-five percent (75%) of the difference. For the purpose of this subparagraph (d) the presently estimated operating costs per unit are as follows:

Stripping	$0.166
Mining	0.141
Hauling	0.313
Milling	0.190
Drilling	0.022
Road Maintenance	0.017
Administrative and Overhead	0.041
Total	$0.890

(e) The unit prices specified in subparagraphs (a) and (b) hereof are based upon the present estimate that the net effect of the premiums and penalties provided in subparagraph (f) hereafter will be to reduce the average price paid by the Government by $0.063 per unit. Effective for the periods specified in subparagraphs (c) and (d) above, the price per unit, as provided in subparagraph (b) above, will be adjusted to reflect the difference between

the actual average premium and penalties adjustment per unit for the six (6) months' period specified in subparagraph (b) above, and $0.063 per unit.

(f) As applied to each delivery made to the Government hereunder, the prices per unit specified in this paragraph 4 hereof shall be increased or decreased as the case may be, in accordance with the following premiums and penalties, fractions *pro rata*:

Premiums:

(i) Manganese content above 46 percent (dry basis); ½ cent for each 1.0 percent;

(ii) Iron content below 6.0 percent (dry basis): ½ cent for each 1.0 percent.

Penalties:

(i) Manganese content below 46 percent (dry basis): 1 cent for each 1.0 percent down to and incuding 42.0 percent; below 42.0 percent, 4 cents plus 1½ cents for each 1.0 percent down to 40.0 percent minimum.

(ii) Iron content above 6.0 percent (dry basis): 1 cent for each 1.0 percent up to and including 8.0 percent; above 8 percent: 2 cents plus ¾ cent for each 1 percent up to 16 percent maximum;

(iii) Silica plus alumina content above 11.0 percent (dry basis): 1 cent for each 1.0 percent up to 15.0 percent maximum;

(iv) Phosphorus content above 0.12 percent (dry basis): 1 3 cent for each 0.01 percent up to 0.3 percent maximum.

(g) In the event that the second slime pond is required to be constructed, and that in accordance with the provisions of paragraph 5 hereafter, an advance payment is requested with respect thereto, as compensation for the additional capital and operating costs incident to the construction of such second slime pond, the price per unit for manganese ore produced hereunder after such pond is placed in operation shall be increased by an amount per

unit to be agreed upon between the parties as reasonably reflecting the additional capital, interest thereon and operating costs per unit incurred therefor. Agreement as to such increase in price shall be subject to such additional terms and conditions relating to the construction and financing of said second slime pond as may be agreed upon by the parties, and shall be a condition precedent to the granting of such advance by the Government. The increase in price per unit resulting from such agreement shall be retained by the Government for all sales made to it hereunder and immediately applied to the repayment of all advances, together with accrued interest thereon, made under this contract until such time as the amount so retained equals the amount of the advance granted for the construction of said second slime pond, plus accrued interest.

(h) If the average concentration ratio of mill feed to manganese ore produced by your washing and concentrating plant during the six (6) months' period specified in paragraph 4 (b) hereof, shall fall below four percent (4%), the Government will reimburse you at the rate of $1,150 for each 0.01 percent (0.01%), fractions *pro rata*, that such average ratio during said period shall fall below four percent (4%) down to and including three percent (3%), provided, however, that in no event shall the obligation of the Government pursuant to this subparagraph exceed $115,000. Similarly, if the average ratio during said period exceeds four percent (4%), the Government shall retain, from moneys otherwise due you, $1,150 for each 0.01 percent (0.01%), fractions *pro rata*, that such average ratio exceeds four percent (4%) provided, however, that in no event shall such retention exceed $115,000.

(i) The average direct operating cost per unit of manganese for (a) direct labor and (b) other direct costs, during the twelve-month period referred to in subparagraph (c) hereof, shall be determined at the end of such period.

"Direct Labor" is defined as non-supervisory productive labor engaged in mining, hauling and milling of mine-run ore.

"Other Direct Costs" is defined as and limited to fuel, lubricants, power, repair parts and miscellaneous operating supplies.

"Base Month" is defined as the month during which the end of the above twelve-month period occurs.

The costs per unit for "direct labor" and "other direct costs", determined as above, will be adjusted as of the the end of March, June, September and December of each year thereafter, beginning with the end of the quarter which first occurs 45 days or more after the end of the twelve-month period. The basis for the adjustment will be the costs per unit determined as above, multiplied by:

(1) Direct Labor—the percentage of change from the base month to the last month of the quarter in the Index of Average Hourly Earnings for the industry designated as "Metal, Mining", as published monthly by the U. S. Department of Labor, Bureau of Labor Statistics.

(2) Other Direct Costs—the percentage of change from the base month to the last month of the quarter in the Index of Wholesale Prices (1947-1949=100) for the group designated as "All Commodities Other Than Farm and Foods" as published monthly by the U. S. Department of Labor, Bureau of Labor Statistics.

The aggregate of the direct operating cost adjustments, as determined above will increase or decrease the prices per unit as adjusted under the provision of subparagraphs (d) and (e) above, applicable to deliveries made in the quarter following the next succeeding quarter; provided however, that no increase or decrease of less than one-half cent per unit will be made effective.

5. For the purpose of assisting you in the performance of your obligations hereunder, the Government will, after your acceptance of this order and upon your written request, advance to you from time to time as may be needed by you in the developing, equipping, preparation and operation of the aforesaid facilities, including working capital,

completion of the land purchase, and the acquisition and installation of new facilities, for the mining, production and processing of the ore called for hereunder, sums of money which may total but may not exceed $3,807,250 (of which sums, $155,000, shall be requested and used, if and when required, exclusively for the construction of the second slime pond, in accordance with the provisions of paragraphs 2 and 4(g) hereof), subject to the following terms and conditions:

(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilites are completed and the equipment is purchased.

(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.

(d) The Government shall have a lien paramount to all other liens upon the credit balance in the special account or accounts in which the advance payments may be deposited, upon materials produced by you from the facilities, and upon all other assets.

(e) You will purchase and maintain at your expense insurance on the facilities of such types and in such amounts as are satisfactory to the Government.

(f) Of the $3,807,250 which the Government may advance hereunder, up to $2,788,650 shall be used for the acquisition and completion of the new facilities (of which $155,000 shall be used for the construction of the second slime pond, if and when required), up to $418,600 shall be used to pay off the balance owed on mining properties and up to $600,000 shall be used for working capital requirements of the new facilities.

(g) All advance payments shall bear interest at the rate of four percent (4%) per annum on the unpaid balance from the date of the advance. Interest will accrue on the basis of a 365 (or 366) day year. The amount of each repayment will first be credited against the interest accrued to the date of payment and then against the unpaid principal. Interest on moneys advanced before the effective date of production will be added to the moneys advanced and interest thereafter will be computed on the sum thereof.

(h) So long as any part of the moneys advanced hereunder, together with accrued interest thereon, remains unpaid, the ownership and management of the corporation shall be subject to the approval of the Government and no substantial change in ownership or management, by merger or liquidation, or otherwise, will be made without the prior approval of the Government.

(i) For the purpose of repayment to the Government of funds advanced pursuant to subparagraph (g) hereof for acquisition and construction of facilities, working capital and completion of payment of obligations for land, the Government will withhold from payments otherwise due you for ore delivered to it as provided herein, the sum of $0.35 per long ton unit. If, with the consent of the Government, manganese fines are sold by you to private industry, you agree in such instances to remit directly to the Government $0.35 for each unit so sold. In addition to the foregoing, there will be withheld or remitted such additional amounts as may be provided for pursuant to the provisions of paragraph 4 (g) hereof.

(j) For each advance payment made to you hereunder you shall furnish the Government with a promissory note in form to be prescribed by the Government for the full amount of such advance, bearing interest at four percent (4%) from the date of the advance payment, payable on or before January 1, 1960.

(k) You may at any time or times, at you option, repay from any unobligated funds of the corporation the whole or any part of the Government advance, together with accrued interest thereon. Upon expiration of the term of this contract, or upon prior termination of the contract, such portion of the advance payments made under the contract as have not been repaid to the Government, together with accrued interest thereon, shall be immediately due and payable.

(l) No portion of the funds advanced hereunder, and no portion of the funds received from the sale of ore produced under the provisions of this agreement, shall be used by you for exploratory or experimental work relating to production of manganese or other products from lands owned by you and not utilized for the purpose of this contract, except such funds as may be accrued to the corporation as provided in subparagraph (m) below.

(m) Effective as of the date of the commencement of production of ore, as defined in paragraph 1 hereof, you may withdraw from net profits, after taxes, received from your operations hereunder for any corporate use, not in excess of $75,000 in any calendar year.

(n) All outstanding corporation obligations as of March 17, 1952, except those which will be liquidated through advances by the Government, are to be liquidated in full prior to any advance of funds hereunder.

6. You will make your washing and concentrating plant available and will process, upon six (6) months' written advance notice and at fair and reasonable charges to be fixed by the Government, any and all quantities of mine-run ore of types and kinds similar to those which are the subject matter of this agreement which are furnished by the

Government from ores purchased by the Government from other producers in your area throughout the term of this contract, and in a total quantity not in excess of ten percent (10%) of the mine-run ore to be processed by you to produce the quantity of manganese ore to be sold to the Government hereunder. The time allowed for the completion of this contract, as specified in paragraph 7 (a) hereof shall be extended proportionally to the ratio of the quality of mine-run ore processed for Government account to the quantity of such ore processed by you to meet the requirement of paragraph 3 (a) of this agreement, but not to exceed 10 percent (10%) of such contract time.

7. (a) Subject to the provisions of paragraphs 6 and 9 hereof, this order will terminate June 30, 1959, or upon the earlier occurrence on one of the following:

(i) the production of 264,000 long dry tons of manganese ore from the facilities described in paragraphs 1 and 2 hereof.

(ii) the expiration of six (6) years after the commencement of production, as defined in paragraph 1 hereof.

(iii) the repayment to the Government of all advances made hereunder and all interest accrued thereon.

(b) Notwithstanding the provisions of subparagraph (a) above, the obligations of the parties with respect to the disposition of such manganese ore as has been produced at the time of termination shall remain in effect until discharged in accordance with the terms hereof.

8. (a) You will maintain in accordance with generally accepted accounting principles, separate books and records of the costs of the new facilities incurred by you in connection with your obligations under the contract and the disbursement of funds advanced therefor; and of the operation of new facilities.

(b) Beginning with the effective date of production as defined in paragraph 1 hereof, you will furnish the Govern-

ment monthly cost statements broken down in a manner similar to that set forth in paragraph 4 (c) hereof, and a Profit and Loss Statement and Balance Sheet. In addition to the above monthly statements, you will furnish the Government with a Profit and Loss Statement containing detailed operating cost data and a Balance Sheet, both of which are to be prepared by an independent Certified Public Accountant after he has made a detailed audit of the records at the end of the production period specified in paragraph 4 (a) (b) and (c) hereof, and at the close of each fiscal year thereafter.

(c) The Government shall have the right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation.

(d) You shall furnish the Government from time to time such other reports as it may reasonably require, concerning your operations hereunder.

(e) Such books and records, together with supporting data, shall be retained while the contract is in effect, and for the period of three (3) years thereafter.

9. The time for performance by you of your obligations hereunder shall be extended at your option by a period equivalent to any delays, interruptions, or cessations caused by force majeure (herein defined as any cause beyond your reasonable control and not due to your fault or negligence, including without limitation, acts of God, strikes, fire, storm, sabotage, acts of war or public enemy, and priority or allocation requirements or other acts of the Federal Government). You shall give prompt notice to the Government of the occurrence of any such cause.

10. All contract provisions presently required by Federal Law, Executive Order, or applicable regulations, to be included in contracts of this type herein described, are hereby incorporated herein by reference.

11. Your acceptance of this order will be indicated by affixing your signature to this letter and two copies hereof and mailing or delivering the executed original and one executed copy to the Defense Materials Procurement Administrator within fifteen (15) days from the date of this letter. Such acceptance will constitute this order a contract on the terms set forth herein.

12. This contract is entered into pursuant to the Defense Production Act of 1950, as amended (Public Law 774, 81st Congress; Public Laws 69 and 96, 82nd Congress).

UNITED STATES OF AMERICA

Defense Materials Procurement Agency
By s Jess Larson
Defense Materials Procurement
Administrator

Accepted: April 7, 1952
WESTMORELAND MANGANESE CORPORATION
By s O. E. Sellers
Title: President
GSA-WASH DC 52-11191

EXHIBIT C

REAL ESTATE AND CHATTEL MORTGAGE

This mortgage, made by and between Westmoreland Manganese Corporation, a corporation duly organized and existing under the laws of the State of Maryland and qualified to do business in the State of Arkansas (said corporation hereinafter referred to as "Mortgagor"), and the United States of America (hereinafter referred to as the "Mortgagee").

Witnesseth

Whereas, at a special meeting of the stockholders of the Mortgagor held at the Fort Stanwix Hotel, Johnstown, Pennsylvania, on the 28th day of April, 1952, a resolution

was duly adopted by the stockholders owning 84% of the stock of the Mortgagor consenting to this mortgage, and

Whereas, at a special meeting of the Board of Directors of the Mortgagor held on the 28th day of April, 1952, it was duly resolved that this mortgage be executed by the President of the Mortgagor in the Mortgagor's name and Mortgagor's corporate seal be hereunto affixed and attested by the secretary and that this mortgage be duly acknowledged and delivered on behalf of the Mortgagor to the Mortgagee, and

Whereas, the Mortgagor has executed its certain promissory note bearing even date herewith for the principal sum of $3,807,250 payable to the order of the Mortgagee on or before January 1, 1960, with interest thereon at the rate of four percent (4%) per annum from the date of each advance;

Now, therefore, the Mortgagor hereby mortgages to Mortgagee the following:

A. Real estate situate, lying and being in the Counties of Independence and Izard, State of Arkansas, more particularly described as follows, to-wit:

[Descriptions of various tracts omitted]

B. Also real estate situate, lying and being in the Counties of Independence and Izard, State of Arkansas, more particularly described as follows, to-wit:

[Description of lands omitted]

together with all and singular the tenements, hereditaments and appurtenances belonging or in anywise appertaining to the premises above-described in A. and B., or any part thereof, and all reversions, remainders, revenues, rents, issues and profits thereof (including in the foregoing but not limited to all buildings, manufacturing plants, railroad sidings, improvements and fixtures now or hereafter located in, on or about said premises; all easements, rights of way, licenses and privileges to said premises belonging or in anywise appertaining, now or hereafter owned by the Moragagor; and all the estate, right, title, interest, prop-

erty, possession, claim and demand whatsoever, as well at law as in equity now or hereafter owned by the Mortgagor, of, in and to said premises, property and rights, and each and every part of the same, with the appurtenances), subject, however, to any and all existing easements, rights of ways, restrictive covenants, licenses, reservations of record, and grants for highway purposes.

Said premises, property and rights hereby mortgaged are hereinafter collectively sometimes called "said premises".

C. Mineral rights in real estate situate, lying and being in the Counties of Independence and Izard, State of Arkansas, more particularly described as follows, to-wit:

[Description of lands omitted]

D. Also mineral rights in real estate situate, lying and being in the Counties of Independence and Izard, State of Arkansas, more particularly described as follows, to-wit:

[Description of lands omitted]

together with all and singular all the metals, minerals, ores and ore bearing material now or hereafter owned, belonging to or claimed by the Mortgagor;

E. Furniture, fixtures, machinery and equipment described as follows:

(1) Existing items of furniture, fixtures, machinery and equipment as follows:

One Caterpillar D8 Tractor, Serial No. 2U12575 equipped with 8A Bulldozer and No. 25 Cable Control 9D17134
One Willys No. 1274 Jeep
Three Gasoline-powered hoisters; 6 wheelbarrows; 9 mining tubs; 750 feet 2" black steel pipe; small two-wheel trailer;
Two sample Splitters
Weigh scales, loading ramp and miscellaneous loading equipment at Pfeiffer, Arkansas, including 5 gasoline hoists, 5 windlass beams and 375 feet of steel cable.

Office Equipment:

10 Chairs
4 Desks
1 Typing Stand
3 Desk Lamps
1 Electric Fan
1 Typewriter
1 Steel file cabinet

(2) Furniture, fixtures, machinery and equipment and all other personal property hereafter acquired by Mortgagor, together with all and singular the parts of and accessories to all said property, whether now belonging thereto or hereafter added thereto by way of renewal, replacement or otherwise.

F. Any and all property, real, personal or mixed or rights to property hereafter acquired by Mortgagor, including the special bank account or accounts established by Mortgagor pursuant to the agreement of April 7, 1952 between Mortgagee and Mortgagor and any amendment thereto.

The personal property and chattels hereby mortgaged or intended so to be, shall be real estate for all the purposes of this mortgage and shall be had and taken to be fixtures and appurtenances to the above-described premises and, except for the hauling equipment and manganese ore, shall not be separated therefrom.

Said premises, property and rights described and referred to in the foregoing "A", "B", "C", "D", "E" and "F" are hereinafter designated as "mortgaged property".

To have and to hold the mortgaged property unto the Mortgagee and its successors and assigns, forever.

This mortgage shall constitute a first lien on the mortgaged property.

This morfgage is given to secure payment of the principal and interest at four per cent (4%) per annum of any and all amounts up to $3,807,250 and any additional amounts, which are advanced by Mortgagee to Mortgagor or which become due and owing to Mortgagee, pursuant to a letter agreement dated April 7, 1952, between Mortgagee and Mortgagor or any amendment thereof, or pursuant to the definitive contract to be entered into between the Mortgagor and Mortgagee at a subsequent date, which definitive contract shall supersede and be in substitution of the aforesaid letter agreement of April 7, 1952. The indebtedness is evidenced by a promissory note of even date herewith executed by the Mortgagor and payable January 1, 1960. The note shall be payable to Mortgagee, its assigns, or order, at the office of the Treasurer of the United States or its assigns or at the office of the Defense Materials Procurement Agency, its successors or assigns, in Washington, D. C., or at such other place as Mortgagee may from time to time appoint in writing, with interest at the rate of four per cent (4%) per annum from the date of each advance to the Mortgagor, payment of principal and interest to be made as provided in the letter agreement date April 7, 1952, between Mortgagee and Mortgagor, or any amendment thereof, or pursuant to the aforesaid definitive contract.

That Mortgagor does for itself, its successors and assigns, hereby covenant with the Mortgagee and its assigns as follows:

That Mortgagor has good and legal right to mortgage the mortgaged property; that Mortgagor will warrant and defend the title to the property described in A. above and to the mineral rights described in C. above, to Mortgagee forever against any and all claims and demands whatsoever; that Mortgagor will execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered all and every such further assurances in law as may be required for the better mortgaging unto Mortgagee all and singular the mortgaged property hereby mortgaged;

That the Mortgagor will punctually pay and discharge as the same becomes due and payable all taxes, assessments

and other governmental charges whatsoever, lawfully levied or assessed against the mortgaged property or any part thereof; and will promptly furnish the Mortgagee upon demand the receipt or receipts showing such payments; provided, however, that the Mortgagor may pay any of such taxes, assessments or governmental charges under protest or take any other appropriate steps to contest the same should it believe any such tax, assessment or governmental charge not to be due and payable; that Mortgagor shall not permit the mortgaged property or any part thereof to be sold or forfeited for any tax, assessment or governmental charge whatsoever;

That the Mortgagor will perform all such acts as will preserve and keep valid the lien and priority intended to be created by this instrument;

That, at all times during the existence of any indebtedness hereby secured, Mortgagor will keep or cause to be kept insured such of the insurable plants, buildings, machinery, equipment apparatus and real and personal property of the Mortgagor now or hereafter forming part of said mortgaged property as are usually insured by companies operating like properties against destruction or damage by fire, floods, windstorms, tornadoes, cyclones or other acts against which insurance is usually carried by companies operating like properties, all to such amount and upon such properties subject to the lien of this mortgage as may be deemed proper and reasonable by the Mortgagee; that all such insurance shall be written in insurance companies satisfactory to the Mortgagee, and the policies shall, by their terms, in form satisfactory to the Mortgagee, protect the interest of the Mortgagee in the insured property; that the Mortgagor will deliver all such policies to the Mortgagee. Should any loss occur to the insured property, the Mortgagee is hereby appointed attorney-in-fact for the Mortgagor to make proof of loss if the Mortgagor fails to do so promptly; to receipt for any sums collected under said policies, which sums or any part thereof, at the option of the Mortgagee, may be applied as the Mortgagee may determine on account of any indebtedness hereby secured or to the restoration or repair

of the property so destroyed or damaged; and, in the event that any insurance losses are paid by check, draft or other instrument payable to the Mortgagor and the Mortgagee jointly, the Mortgagee may endorse the Mortgagor's name thereon and take such further steps in behalf of the Mortgagor as are necessary to realize on such instrument. The Mortgagor promptly will give notice by mail to the Mortgagee of any loss or damage to the mortgaged property and will not adjust or settle such loss without the written consent of the Mortgagee. In the event of foreclosure of this mortgage, all right, title and interest of the Mortgagor in and to all insurance policies then in force shall pass to the purchaser at the foreclosure sale and the Mortgagee is hereby appointed attorney-in-fact for the Mortgagor to assign and transfer said policies;

That the Mortgagor will, until payment in full of all the indebtedness hereby secured use the mortgaged property in a careful and prudent manner and will maintain all buildings, improvements and other property now or hereafter forming part of said mortgaged property in constant repair and working order and in a fit condition for their proper use and occupancy, reasonable use and wear thereof excepted, provided, that, with respect to any damage resulting from any loss insured against, Mortgagor shall have no obligation to repair or replace damaged property except to the extent that the insurance proceeds for such loss shall be made available to Mortgagor by Mortgagee, and provided further, that the Mortgagor may at its option apply the insurance proceeds available to it for loss on account of such damage to the repair or replacement of the damaged property or to the acquisition, construction and installment of buildings or improvements, machinery and equipment of a different kind from those damaged or destroyed which Mortgagor deems necessary or useful in the production of manganese concentrates (such buildings, improvements, machinery and equipment to be subject to the lien of this mortgage).

That, the Mortgagor will not create or permit to accrue any debt, lien or charge on said premises or any part thereof which would be prior to or on a parity with the

lien of this mortgage; that Mortgagor will prevent any debt, lien or charge from affecting the rights of the Mortgagee, and will appear in and defend any action or proceeding arising on or subsequent to the date hereof purporting to affect the lien of this mortgage or the rights or powers of Mortgagee hereunder, and Mortgagor will pay all expenses incident thereto.

That the Mortgagor will comply with all statutes, ordinances, regulations and rules that may be established by any legally constituted public authority with respect to the use, maintenance and care of property which is the subject of this mortgage;

That (a) in case there shall be any default in the payment of any indebtedness hereby secured according to the terms of any instrument evidencing the same or any failure or non-performance of any condition, covenant or agreement contained in said notes or contained in this mortgage which default, failure or non-performance shall continue unremedied for a period of sixty (60) days after receipt of written notice from Mortgagee to Mortgagor specifying such default, failure or non-performance; or (b) in case the mortgaged property be placed under control or in custody of any court by reason of the institution of any judicial proceeding by a party other than the Mortgagee wherein a receiver of the Mortgagor or of the Mortgagor's property shall be appointed on the ground of the Mortgagor's failure to pay the Mortgagor's debts and such mortgaged property continues under such control or in such custody of the court for a period of sixty (60) days; or (c) in case a debtor's or creditor's petition filed pursuant to provisions of the Bankruptcy Act, affecting the mortgaged property be approved and the decree or order of the court approving such petition shall remain in effect for a period of sixty (60) days; or (d) in case Mortgagor abandons any of the mortgaged property and shall fail to repossess such property within sixty (60) days after receipt of written notice from Mortgagee to Mortgagor specifying such abandoned property and claiming the abandonement thereof as a default hereunder; or (e) in case Mortgagor shall fail to pay any taxes, assessments, gov-

ernmental charges, or to maintain insurance all as hereinbove provided; or (f) in case Mortgagor fails or refuses to perform any of the terms of said letter agreement dated April 7, 1952, or any amendment thereof or of the aforesaid definitive contract to be subsequently executed, and such failure or refusal remains unremedied for a period of sixty (60) days from the date of receipt by Mortgagor of a notice from Mortgagee specifying such failure or refusal; then upon the happening of any of the events referred to in (a) to (f) hereof, each of which events shall be an event of default hereunder, Mortgagee is hereby authorized and empowered, if and so long as the event or events of default in question remain unremedied, at its option, and without affecting the lien hereby created or any right of Mortgagee hereunder:

(1) to make good any such default or defaults and any money advanced by the Mortgagee for any such purpose shall be added to the principal debt and shall bear interest at the rate of four per cent (4%) per annum from the respective dates of payment, and shall be secured by the lien of this instrument and in case Mortgagee makes any such payment it shall be without prejudice to the Mortgagee's other rights hereunder; and

(2) to declare the entire indebtedness hereby secured to be immediately due and payable, and enforce any of the rights which accrue to Mortgagee hereunder and foreclose this mortgage.

That in the event that an action shall be instituted to foreclose the Mortgagor's equity of redemption, the Court shall, on application of the complainant or its attorneys in such action, appoint a receiver to take immediate possession of, manage and control said mortgaged property, notwithstanding that the same or part thereof is occupied by the Mortgagor, and to collect and receive the rents and profits thereof, and apply the same under the direction of the Court;

That no waiver by the Mortgagee of any breach of any condition, covenant or agreement herein referred to

shall be construed as a waiver of any subsequent breach of the same or any such condition, covenant or agreement;

That Mortgagee may, subject to the approval of the Mortgagor, release portions of the mortgaged property from the lien hereof without affecting the lien of this mortgage upon the mortgaged property or remainder thereof for the full amount of the indebtednes then remaining unpaid;

That this mortgage and the lien thereof shall extend to any additional premises, property and rights hereafter acquired; and that all such premises, property and rights shall forthwith upon acquisition thereof, and without further act, become subject to this mortgage and the lien thereof;

That at any and all times the Mortgagor will do, execute, acknowledge and deliver, or will cause to be done, executed, acknowledged and delivered all and every such further acts, mortgages and assurances in law as the Mortgagee shall reasonably require, for the better assuring, mortgaging, pledging and confirming unto the Mortgagee all and singular said property;

Mortgagor will allow Mortgagee to inspect at any reasonable time Mortgagor's records pertaining to the mortgaged property; and will furnish promptly and fully at any reasonable time, upon written request, certified copies of financial statements and inventory reports.

All judgments, decrees and awards for injury or damage to the mortgaged property and all awards pursuant to proceedings for condemnation thereof, as rent or otherwise and whether for a temporary taking or otherwise are hereby assigned in their entirety to Mortgagee who shall apply the same to the indebtedness secured hereby in such manner as it may elect, and Mortgagee is hereby authorized in the name of Mortgagor to execute and deliver valid acquittances for, and to appeal from any such award, judgment or decree. Settlement shall be made pursuant to any proceedings for condemnation only with the consent of Mortgagee.

That the Mortgagor will not pull down or remove any buildings, structures, fixtures, equipment, machinery, chattels and personal property now owned or hereafter acquired by Mortgagor without the permission in writing of the Mortgagee unless such pulling down or removal shall be rendered necessary by any of the said mortgaged property being worn out or injured and in such case the Mortgagor shall replace the premises or articles worn out or injured by others of at least equal value.

In case of foreclosure of this mortgage in any court of law or equity, and whether or not any order or decree shall have been entered therein, a reasonable sum shall be allowed for attorneys' fees of the plaintiff in such proceeding, and in addition thereto a reasonable sum for stenographers' fees and for all moneys expended for documentary evidence and the cost of a complete abstract of title and title report for the purpose of such foreclosure, such sums to be secured by the lien hereunder; and there shall be included in any judgment or decree foreclosing this mortgage and be paid out of said rents or the proceeds of any sale made in pursuance of any such judgment or decree: (1) all costs and expenses of such suit or suits, advertising, sale and conveyance, including attorneys' and stenographers' fees, outlays for documentary evidence and cost of complete abstract of title, and title report; (2) all moneys advanced by the Mortgagee, if any, for the purpose authorized in this mortgage, with interest as herein provided; (3) all the accrued interest remaining unpaid on the indebtedness hereby secured; (4) all the said principal money remaining unpaid. The overplus of the proceeds, if any, shall be paid to the Mortgagor on reasonable request, or as the court may direct.

That Mortgagor hereby waives, to the extent permitted by law, the benefits of all valuation, appraisement, homestead, exemption, stay, redemption and moratorium laws of the State of Arkansas, now in force or which may hereafter become laws.

That except as herein expressly provided to the contrary, no right or remedy herein conferred upon or re-

served to the Mortgagee is intended to be exclusive of any other right or remedy provided by this or any other instrument or by any applicable law including but not limited to suit or suits upon the note or notes secured hereby, but each and every such right or remedy shall be cumulative. No delay or omission by the Mortgagee in exercising any right or power accruing upon default as hereinbefore in this mortgage provided, shall impair any such right or power, or be construed to be a waiver of any such default or acquiescence therein;

That this mortgage and all the Mortgagee's rights hereunder shall remain in full force and effect notwithstanding that the Mortgagee may at any time or times, in its discretion, by action taken or by forbearance, grant, agree to or permit any extensions, renewals, modifications, waivers or indulgences whatsoever with respect to any indebtedness secured hereby, or otherwise in any manner alter the terms thereof, or take, alter or release any security for such indebtedness in addition to this mortgage, and that the Mortgagee may enforce this mortgage without resorting to any other security for such indebtedness;

Now, therefore, the condition of this mortgage is such: That if all the indebtedness hereby secured is punctually paid to the Mortgagee on or before January 1, 1960, its successors or assigns, according to the tenor of any instrument or instruments evidencing the same and the Mortgagor shall punctually perform the Mortgagor's covenants herein contained, then this mortgage shall become null and void; otherwise the same shall remain in full force and effect.

The terms "Mortgagor" wherever used herein shall include the Mortgagor's successors and assigns and the context shall be construed accordingly, all to the end that the mortgage, covenants and all other provisions of this mortgage in favor of the Mortgagee and the Mortgagee's rights and remedies hereunder shall be most fully effective without any derogation whatsoever. This mortgage and the covenants and all other provisions hereof shall inure to the benefit of the Mortgagee and its assigns.

The unenforceability or invalidity of any provision or provisions of this mortgage shall not render any other provision or provisions herein contained unenforceable or invalid.

In witness whereof, the Mortgagor has executed this instrument in four counterparts this 22nd day of May, 1952.

WESTMORELAND MANGANESE CORPORATION

By /s/ Orville E. Sellers
President

ATTEST:
/s/ William H. Specht
Secretary

EXHIBIT D

SUPPLEMENTAL MORTGAGE

The undersigned, Westmoreland Manganese Corporation, a corporation under the laws of Maryland (herein called "Mortgagor"), has heretofore executed unto the United States of America (herein called "Mortgagee") a Real Estate and Chattel Mortgage, of even date herewith, conveying to Mortgagee the properties therein mentioned, as security for the repayment to Mortgagee of—

(a) all sums at any time hereafter advanced by Mortgagee to Mortgagor against the Promissory Note of the Mortgagor, of even date herewith, in the principal sum of $3,807,250.00, bearing interest from date until paid at the rate of four per cent per annum, payable (subject to the maturity acceleration provisions contained in said Real Estate and Chattel Mortgage and in this Supplemental Mortgage) on or before January 1, 1960, and

(b) any additional amounts (with all interest accruing thereon) at any time hereafter advanced by Mortgagee to Mortgagor, or which may hereafter become due and owing by Mortgagor to

Mortgagee, pursuant to a Letter Agreement dated April 7, 1952, between Mortgagee and Mortgagor, or any future amendment thereto, or pursuant to any definitive contract which may hereafter be entered into between Mortgagee and Mortgagor for the purpose of superseding said Letter Agreement,

which advances (with the interest thereon) are repayable to Mortgagee as provided in said Letter Agreement of April 7, 1952, or any future amendment thereto, or as provided in any definitive contract which may hereafter be executed for the purpose aforesaid.

Said Real Estate and Chattel Mortgage, of even date herewith, is being established of record as a real estate encumbrance in Izard County, Arkansas, and in Independence County, Arkansas, and as a chattel encumbrance in Independence County, Arkansas, and in Pulaski County, Arkansas, concurrently with the establishment of record in said counties of this Supplemental Mortgage.

For the purpose of supplementing the provisions of said Real Estate and Chattel Mortgage, of even date herewith, and without waiving any rights accruing to the Mortgagee thereunder, it is hereby agreed by the Mortgagor:

I

For the purpose of making more explicit the description of certain properties encumbered by said Real Estate and Chattel Mortgage, it is here acknowledged by Mortgagor that said Real Estate and Chattel Mortgage was intended to, and does, grant, bargain, sell and convey to Mortgagee:

(A) The manganese washing and concentrating plant now owned by Mortgagor and located in Independence County, Arkansas, approximately seven miles from the town of Cushman, together with all buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, sidings, switch

tracks and all other machinery, equipment and personal property (including office equipment and automotive equipment) now or at any time hereafter comprising said plant, or used by Mortgagor in connection with the operation of said plant, or held or acquired by it for possible use in such respect.

(B) The manganese washing and concentrating plant (of an estimated daily capacity of six thousand long tons) which is to be constructed by Mortgagor and located in Independence County, Arkansas, approximately seven miles from the town of Cushman, at or near the site of the present plant mentioned in (A) aforesaid, together with all buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, slime pond facilities, sidings, switch tracks and all other machinery, equipment and personal property (including office equipment and automotive equipment) at any time hereafter comprising said plant, or used by Mortgagor in connection with the operation of said plant, or held or acquired by it for possible use in such respect.

(C) All other machinery, equipment and personal property (whether similar or dissimilar to any of the foregoing), wherever located, now owned by Mortgagor or at any time hereafter acquired by it.

(D) All land, and interests therein, located in Independence County, Arkansas, or in Izard County, Arkansas, or in any other county within the State of Arkansas (and regardless of whether the same may or may not be specifically described in the above mentioned Real Estate and Chattel Mortgage) now owned by Mortgagor or at any time hereafter acquired by it.

(E) All interest in minerals located in, under or upon lands in Independence County, Arkansas, Izard County, Arkansas, or any other county in the State of Arkansas (the term "interests" including leasehold interests, mining and exploration rights, or the absolute ownership of minerals *in situ*), now owned by Mortgagor, regardless of whether the same may or may not be specifically de-

scribed in said Real Estate and Chattel Mortgage, and all such interests at any time hereafter acquired by it.

(F) All easements, rights-of-way, franchises and privileges now owned by Mortgagor or at any time hereafter acquired by it.

(G) All ores and ore products at any time owned by the Mortgagor, whether produced from lands mined by Mortgagor or otherwise; including particularly all manganese ores produced through Mortgagor's operations.

II

While it is agreed that all future acquisitions by Mortgagor of real property, mineral interests and personal property shall, by virtue of the "after acquired property" provisions of said Real Estate and Chattel Mortgage, and of this Supplemental Mortgage, be subject to the lien of each of said two instruments, nevertheless, to the end that such future acquisitions may be encumbered under instruments more specifically describing the same, Mortgagor agrees that it will, from time to time, upon request of Mortgagee, execute, acknowledge and deliver to Mortgagee, and cause to be established of record, such additional instruments, on form approved by Mortgagee, as may be necessary to encumber all such after acquired property items under a more specific description. The failure or refusal in any instance to execute such additional instruments and establish the same of record shall constitute a ground for the acceleration (at Mortgagee's option) of the maturity of the secured indebtedness additional to the events of acceleration recited in said Real Estate and Chattel Mortgage.

III

As to each item of property conveyed by Mortgagor to Mortgagee under said Real Estate and Chattel Mortgage, or under this Supplemental Mortgage, it is the intention of the Mortgagor to convey the full fee simple ownership in the instance of Real Estate or the absolute ownership in the instance of personal property. Mortga-

gor's warranty of title, however, is limited to the extent set out in said Real Estate and Chattel Mortgage.

IV

It being understood that the cost of constructing the proposed manganese washing and concentrating plant (to be erected as provided in Paragraph (B) of Subdivision I aforesaid) is to be paid out of the proceeds of the advances to be made by Mortgagee to Mortgagor as hereinabove set out, it is understood (and notice is hereby given) that the lien of the Mortgagee under said Real Estate and Chattel Mortgage and under this Supplemental Mortgage upon said manganese washing and concentrating plant (and the site thereof) will take priority over the lien of any mechanic, materialman or laborer or any other statutory lien.

V

In addition to the events for the optional acceleration of maturities recited in said Real Estate and Chattel Mortgage, it is agreed that the entire indebtedness secured by said Real Estate and Chattel Mortgage, and by this Supplemental Mortgage, shall automatically become due and payable, without notice or demand, upon the adjudication of the mortgagor as a bankrupt. Moreover, it is particularly understood that if the Mortgagor shall at any time hereafter convey its interest in the mortgaged properties, or shall transfer such properties to another corporation through merger, reorganization or otherwise, or shall attempt to make a fraudulent disposition of any of the mortgaged personalty, such act in either event shall constitute an additional ground for the acceleration, at the option of the Mortgagee, of the maturity of the secured indebtedness.

VI

In addition to the waivers of like character contained in the above mentioned Real Estate and Chattel Mortgage, the Mortgagor waives all right of redemption under the act of May 8, 1899, appearing as Section 51-1111 of Arkansas Statutes (1947) Annotated.

VII

It is particularly understood that said Real Estate and Chattel Mortgage, of even date herewith, shall remain in full force and effect as supplemented by the provisions of this Supplemental Mortgage; this Supplemental Mortgage being cumulative to said prior instrument of even date herewith.

In witness whereof, the Mortgagor has executed this instrument in four counterparts on this 22nd day of May, 1952.

WESTMORELAND MANGANESE CORPORATION

By /s/ Orville E. Sellers
President

SEAL

ATTEST:

William H. Specht
Secretary

EXHIBIT G

AMENDMENT NO. 1

TO

LETTER ORDER NO. GS-OOP(D)-12263

BETWEEN

UNITED STATES OF AMERICA

AND

WESTMORELAND MANGANESE CORPORATION

This amendment to Letter Order No. GS-OOP(D)-12263 between the United States of America, acting by and through the Defense Materials Procurement Agency, hereinafter referred to as the "Government" (pursuant to the authority contained in the Defense Production Act of 1950, as amended, and Executive Order No. 10161, as amended and supplemented), and Westmoreland Mangan-

ese Corporation, hereinafter referred to as the "Contractor"

Witnesseth that:

Whereas, the parties hereto entered into Letter Agreement No. GS-OOP(D)-12263, dated April 7, 1952, (hereinafter referred to as the "Contract"), under the terms of which the Contractor covenanted to construct facilities (as defined in the aforesaid Contract), at or near Cushman, Arkansas, which would enable Contractor to produce and process manganese ore within a period of one year from the date of the Contract; and

Whereas, the aforesaid facilities have not been completed and the production of manganese ore will not be commenced within the period provided in the Contract; and

Whereas, the Contractor is without funds to complete the aforesaid facilities and has currently outstanding due and overdue financial obligations to employees, ex-employees, suppliers, contractors and general creditors, which obligations the Contractor is unable to meet.

Now, therefore, in consideration of the mutual promises herein contained and other good and valuable consideration, the parties hereto agree as follows:

1. The Contractor shall place the facilities in a temporary standby condition and shall employ standard methods for preserving the facilities from the elements, theft and damage. All operations at the facilities shall cease, except that the Contractor shall continue with the program for mineral drilling now currently in progress. Funds for the payment of the costs of such drilling program and costs for the maintenance of the facilities while in a standby state shall be made available by the Government out of funds to be provided under the terms of the Contract. Disbursement of such funds shall be made in accordance with the provisions of paragraph 2 hereof, and allowable costs for such work shall be subject to approval by the Government.

2. To enable the Contractor to meet certain of the aforesaid outstanding accrued obligations, the Government shall advance to the Contractor out of funds allotted pursuant to the Contract not to exceed $29,080.42, which sum shall be advanced by the Government to the Contractor only on the condition that the Contractor raises and provides the sum of Fifteen Thousand ($15,000) Dollars to be used to help meet the aforesaid obligations; the aggregate of the aforesaid funds shall be disbursed under procedures to be prescribed by the Government. Current obligations payable pursuant to this paragraph shall be principally the accrued and payable wages and salaries of Contractor's bona fide employees of the clerical, laborer and supervisory class. All obligations payable out of the aforesaid aggregate funds shall be determined by the Government. The expenses of the drilling program and maintenance of the facilities referred to in paragraph 1 hereof shall be paid under procedures to be prescribed by the Government.

3. Notwithstanding any provision in the Contract to the contrary, the Contractor hereby grants to the Government the unqualified right and privilege of terminating the Contract at any time in the future up to commencement of production upon determination by the Government that termination of the Contract is in the best interest of the Government; the Contractor shall take no legal action to prevent such termination of the Contract by the Government, and disclaims any and all recourse by reason of such termination by the Government.

4. Under the terms of a mortgage instrument made by the Contractor to the Government on May 22, 1952, pursuant to the terms of the Contract, it is provided that the Contractor shall have sixty (60) days from notice to remedy the Contractor's failure or refusal to perform any covenant, agreement or condition in the Contract, note or mortgage as a condition precedent to foreclosure. Contractor hereby waives the sixty-day period granted by said mortgage within which to remedy the breach, and agrees that henceforth all moratorium provisions contained in said mortgage shall be without force and effect, and in the

event of termination of the Contract as provided in paragraph 3 hereof, the Contractor shall, on demand of the Government, grant the Government immediate possession of the facilities, with the right to use the facilities in place or off-site, either directly or by contract, and the Government may lease and dispose of such facilities, provided, however, that nothing herein contained shall prejudice or impair the right of the Contractor to an accounting. Contractor shall, at the request of the Government, execute, deliver and record a supplemental mortgage under the terms of which the aforesaid sixty-day moratorium provisions shall be deleted from the original recorded mortgage.

5. The unexpended balance of the funds advanced to the Contractor now on deposit in the special bank account in the First National Bank, Batesville, Arkansas, shall be withdrawn and returned to the Government, the account of the Contractor shall be properly credited with such refund.

In witness whereof, the parties hereto have caused this document to be executed on this 2nd day of April, 1953.

UNITED STATES OF AMERICA

Acting by and through
Defense Materials Procurement Agency

By /s/ Tom Lyon
Acting Deputy Administrator

ATTEST:

WESTMORELAND MANGANESE CORPORATION
By /s/ E. P. Blough
Title: Treasurer

By /s/ W. H. Specht
Title: Secretary
GSA-WASH DC 53-11486

SEPARATE ANSWER AND CROSS-COMPLAINT OF ARKANSAS FOUNDRY COMPANY

(Filed in U. S. District Court on February 23, 1954)

This Defendant, Arkansas Foundry Company, for its Separate Answer to the Complaint states:

I

It admits the allegations of paragraph I of the Complaint.

II

It admits the allegations of paragraph II of the Complaint.

III

It admits the allegations of paragraph III of the Complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have the effect alleged by Plaintiff; denies that it evedinced any valid subsisting indebtedness then owing by the defendant, Westmoreland Manganese Corporation, to plaintiff, and denies that there was any such existing indebtedness.

IV

It admits the allegation of paragraph IV of the Complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit "C" to its Complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate and (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation, and against which the plaintiff now seeks to have its alleged "mortgage" lien claim enforced. This defendant denies that said alleged "mortgage" created a first lien on the alleged "mortgaged property to secure amounts advanced by the plaintiff to West-

moreland" superior to the statutory lien of this defendant for materials and supplies furnished by this defendant to Westmoreland. This defendant denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal to or superior to the statutory lien of this defendant.

V

It admits the allegations of paragraph V of the Complaint only as to the execution of the instrument designated as a "Supplemental Mortgage", and referred to as Exhibit "D" to the Complaint, but denies that the same in fact is a valid mortgage, in that it does not grant or convey any real estate, and, (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant, Westmoreland Manganese Corporation, against which the plaintiff now seeks to have its lien claim enforced, and denies that the said alleged mortgage created a mortgage lien that "would take priority over the lien of any mechanic, materialman, laborer or any other statutory lien", and denies that the said "Supplemental Mortgage" created a mortgage lien superior to that of this defendant for material and supplies furnished to Westmoreland, and denies that plaintiff has or is entitled to any lien against any of the property held or owned by the defendant, Westmoreland Manganese Corporation, equal to or superior to the statutory lien of this defendant.

VI

It admits the allegations of paragraph VI of the Complaint.

VII

It admits the allegations of paragraph VII of the Complaint.

VIII

It admits only the execution of the Agreement entitled "Amendment No. 1 to Letter Order No. GS- from asserting a lien superior to that of this defendant

OOP(D)-12263", but denies that it had or was intended have the effect alleged by the plaintiff; denies that such Amendment to Letter Order, or any other correspondence between the plaintiff, or any of its agencies, and the defendant, Westmoreland Manganese Corporation, in any manner affected the rights of this defendant to its statutory lien and the superiority thereof, and this defendant states that the said Agreement is void for lack of consideration as between the parties and is void as against this defendant, insofar as it may or as it attempts to defeat this defendant of this statutory lien as hereinafter set forth.

IX

It admits this defendant's claim of lien as alleged in paragraph IX of the Complaint, but states that the lien claimed by this defendant, Arkansas Foundry Company, in addition to being a mechanic's and or materialman's lien generally as provided by 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947, Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947, Annotated. This Defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

X

It is without information upon which to base a denial or an admission of the allegations of paragraph X of the Complaint.

XI

It is without information upon which to base a denial or an admission of the allegations of paragraph XI of the Complaint.

XII

It is without information upon which to base a denial or an admission of the allegations of paragraph XII of the Complaint.

XIII

It is without information upon which to base a denial or an admission of the allegations of paragraph XIII of the Complaint.

XIV

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant, Westmoreland Manganese Corporation, and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph XIV of the Complaint, this defendant lacks information to either deny or admit.

XV

And further answering, this defendant, Arkansas Foundry Company, an Arkansas corporation with its principal place of business in the City of Little Rock, in said State, states that between the dates of November 25, 1952, and March 24, 1953, it sold and delivered to the defendant Westmoreland Manganese Corporation, on its direct purchase orders therefor, certain materials and supplies which were furnished for and were used in construction of the plant and buildings of Westmoreland Manganese Corporation, and which are a part of the property against which the plaintiff is now seeking a foreclosure under its alleged "mortgage". That on April 29, 1953, this defendant filed its statement of account and affidavit for lien with the Clerk of the Circuit Court of Independence County, Arkansas, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of the Arkansas Statutes of 1947, Anfotated, thereby asserting and preserving its lien for $48,858.65, plus interest of $409.31, making a total of $49,267.96, and interest on the principal amount of $48,858.65 at 6% from the date of the filing of said affidavit for lien until paid. That said statement of account and affidavit for lien was duly filed in the Office of the Clerk of the Circuit and Chancery Court and Recorder for the County of Independence, State of Arkansas, and now appears of record in the Office of the Circuit Clerk of said County in Book

"B", page "W's" of Mechanic Liens. A copy of the said statement of account and affidavit for lien is attached hereto, made a part hereof, and marked Exhibit "A".

This defendant alleges and here asserts its lien so filed and perfected in the sum of $49,267.96, together with interest thereon, as a first, prior and paramount lien upon and against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's Complaint, and all improvements, machinery, materials, supplies and equipment thereon.

This defendant here asserts that the said lien in the sum of $49,267.96, together with interest thereon at the rate of 6% from April 29, 1953, until paid, is superior to the claim of lien against any of the said properties of Westmoreland Manganese Corporation by the Plaintiff.

XVI

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph II of plaintiff's Complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant, Westmoreland Manganese Corporation, the sum of $930,751.21, which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00, and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure

of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

XVII

And further answering, this Defendant states that the Plaintiff by the terms of its Contract with the Defendant, Westmoreland, which Contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said Defendant, and is jointly liable to this Defendant, Arkansas Foundry Company, to the extent of its commitment to advance funds for the "development, equipment, and preparation of the above-named property (i.e. deposits owned by Westmoreland located near Cushman, Arkansas) for the production of manganese ore"; that the Plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland on that basis and for that purpose and not on the basis of an interest-bearing loan secured by a mortgage, as Plaintiff now by its Complaint attempts to make it appear: That the said transactions as between the plaintiff and the defendant, Westmoreland Manganese Corporation, and as set out in the Complaint, were not in the nature of an interest-bearing loan for moneys loaned by the Plaintiff to Westmoreland, and were not intended as such, but were in truth and in fact moneys advanced by the Plaintiff to the defendant, Westmoreland Manganese Corporation, for manganese to be delivered by Westmoreland to the plaintiff in the future and after the plant was in production.

This Defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland properties into production of manganese; that the Plaintiff under paragraph 6 of the original Contract of April 7, 1952, with Westmoreland had the

"right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation."

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.*"

And this Defendant states that the Plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this Defendant, and allowed such advances to be used for other purposes, and this Defendant states that the Plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of this Defendant.

XVIII

That Plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of $100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

This defendant further states that the plaintiff by its Contract with Westmoreland was committed to advance to Westmoreland as advance payments against manganese to be produced, moneys up to $3,807,250.00; said moneys to be used for the acquisition and completion of new facilities and to put the properties in the production of manganese, and relying on this commitment and agreement of the plaintiff with Westmoreland, this defendant sold and delivered materials to Westmoreland; that the plaintiff has failed and refused to keep its agreement with Westmoreland and has refused to advance the agreed amount to Westmoreland, and that it stood by and encouraged and allowed this defendant to deliver materials to Westmoreland to the extent of $48,858.65, when it knew, or by the exercise of due care, and by the exercise of the power and authority the plaintiff had attempted to reserve and to contract for, over the purchase of material, equipment and supplies, and the payment therefor, out of funds advanced and to be advanced to Westmoreland, should have known that it was not going to advance the full amount of the commitment, and on this account the plaintiff is estopped

Wherefore, this defendant prays that the alleged "mortgage" sought to be foreclosed in this action by the plaintiff be declared to be invalid and inoperative as a mortgage or as creating a mortgage lien against the properties described therein.

This defendant further prays that its lien claim in the amount of Forty-Nine Thousand Two Hundred Sixty-Seven and 96 100 Dollars ($49,267.96), together with interest until date of payment, attach to the land described in the statement of account and affidavit for lien, Exhibit "A" hereto, and to all of the material, supplies and improvements made upon Westmoreland Manganese Corporation's land in question, in preference to any alleged lien or mortgage lien of the plaintiff upon the land and the machinery, material, supplies or specific improvements, placed or located thereon.

This defendant further prays that its statutory lien be declared to be prior, paramount and superior to the alleged claimed mortgage lien of the plaintiff both as to the improvements on the lands and the lands themselves and that the plaintiff be adjudged to be estopped to assert its lien as a paramount or superior lien to that of this defendant.

CROSS-COMPLAINT

This defendant, Arkansas Foundry Company, as Cross-complainant, for its Cross-complaint herein alleges that the defendant, Westmoreland Manganese Corporation, is indebted to it in the sum of $49,265.96, together with interest thereon at the rate of 6% per annum from April 29, 1953, until paid, for which it is entitled to a lien as hereinabove set forth. Certified copies of this defendant's account and affidavit for lien are attached as Exhibit "A" to the Answer and referred to and made Exhibit "A" likewise to this Cross-complaint.

Wherefore, this defendant, and cross-complainant prays for judgment against the defendant, Westmoreland Manganese Corporation in the sum of $49,267.96, together with interest thereon at the rate of 6% per annum from April 29, 1953, until paid, and prays that said judgment

be declared to be a prior, paramount lien upon the following described property:

The Southwest Quarter ($SW^1/_4$) of the Northwest Quarter ($NW^1/_4$) and the North Half ($N^1/_2$) of the Southwest Quarter ($SW^1/_4$), Section Thirty-one (31), Township Fifteen (15) North, Range Six (6) West, Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements; including (but not confined to) the following:

Washer Plant, and the machinery and equipment therein, consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8 D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to this judgment, for its costs, and any and all other relief to which it may appear to be entitled.

Arkansas Foundry Company
By Barber, Henry & Thurman
By /s/ E. A. Henry
Attorneys for Defendant
1408 Donaghey Building,
Little Rock, Arkansas

SEPARATE ANSWER AND CROSS-COMPLAINT OF CROW-BURLINGAME COMPANY

(Filed in U. S. District Court on February 23, 1954)

This Defendant, Crow-Burlingame Company, for its Separate Answer to the Complaint states:

I

It admits the allegations of paragraph I of the Complaint.

II

It admits the allegations of paragraph II of the Complaint.

III

It admits the allegations of paragraph III of the Complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have the effect alleged by Plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by the defendant, Westmoreland Manganese Corporation, to plaintiff, and denies that there was any such existing indebtedness.

IV

It admits the allegation of paragraph IV of the Complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit "C" to its Complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate and (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation, and against which the plaintiff now seeks to have its alleged "mortgage" lien claim enforced. This defendant denies that said alleged "mortgage" created a first lien on the alleged "mortgaged property to secure amounts advanced by the plaintiff to Westmoreland" superior to the statutory lien of this defendant

for materials and supplies furnished by this defendant to Westmoreland. This defendant denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal to or superior to the statutory lien of this defendant.

V

It admits the allegations of paragraph V of the Complaint only as to the execution of the instrument designated as a "Supplemental Mortgage", and referred to as Exhibit "D" to the Complaint, but denies that the same in fact is a valid mortgage, in that it does not grant or convey any real estate, and, (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant, Westmoreland Manganese Corporation, against which the plaintiff now seeks to have its lien claim enforced, and denies that the said alleged mortgage created a mortgage lien that "would take priority over the lien of any mechanic, materialman, laborer or any other statutory lien", and denies that the said "Supplemental Mortgage" created a mortgage lien superior to that of this defendant for material and supplies furnished to Westmoreland and denies that plaintiff has or is entitled to any lien against any of the property held or owned by the defendant, Westmoreland Manganese Corporation, equal to or superior to the statutory lien of this defendant.

VI

It admits the allegations of paragraph VI of the Complaint.

VII

It admits the allegations of paragraph VII of the Complaint.

VIII

It admits only the execution of the Agreement entitled "Amendment No. 1 to Letter Order No. GS-00P-D-12263", but denies that it had or was intended to have the effect alleged by the plaintiff, denies that such

Amendment to Letter Order, or any other correspondence between the plaintiff, or any of its agencies, and the defendant, Westmoreland Manganese Corporation, in any manner affected the rights of this defendant to its statutory lien and the superiority thereof, and this defendant states that the said Agreement is void for lack of consideration as between the parties and is void as against this defendant, insofar as it may or as it attempts to defeat this defendant of this statutory lien as hereinafter set forth.

IX

It admits this defendant's claim of lien as alleged in paragraph IX of the Complaint, but states that the lien claimed by this defendant, Crow-Burlingame Company, in addition to being a mechanic's and or materialman's lien generally as provided by Sections 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947, Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947, Annotated. This Defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

X

It is without information upon which to base a denial or an admission of the allegations of paragraph X of the Complaint.

XI

It is without information upon which to base a denial or an admission of the allegations of paragraph XI of the Complaint.

XII

It is without information upon which to base a denial or an admission of the allegations of paragraph XII of the Complaint.

XIII

It is without information upon which to base a denial or an admission of the allegations of paragraph XIII of the Complaint.

XIV

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant, Westmoreland Manganese Corporation, and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph XIV of the Complaint, this defendant lacks information to either deny or admit.

XV

And further answering, this defendant, Crow-Burlingame Company, an Arkansas corporation with its principal place of business in the City of Little Rock, in said State, states that between the dates of December 22, 1952, and March 10, 1953, Crow-Burlingame Co. sold and delivered to the defendant Westmoreland Manganese Corporation, on its direct purchase orders therefor, certain materials and supplies which were furnished for and were used in construction of the plant and buildings of Westmoreland Manganese Corporation, and which are a part of the property against which the plaintiff is now seeking a foreclosure under its alleged "mortgage". That on June 1, 1953, this defendant filed its statement of account and affidavit for lien with the Clerk of the Circuit Court of Independence County, Arkansas, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of the Arkansas Statutes of 1947, Annotated, thereby asserting and preserving its lien for $4,297.32, plus interest of $68.80, making a total of $4,366.12, and interest on the principal amount of $4,297.32, at 6% per annum from the date of the filing of said affidavit for lien until paid. That said statement of account and affidavit for lien was duly filed in the Office of the Clerk of the Circuit and Chancery Court and Recorder for the County of Independence, State of Arkansas, and now appears of record in the Office of the Circuit Clerk of said County in Book "B", page "W's" of Mechanics Liens. A copy of

the said statement of account and affidavit for lien is attached hereto, made a part hereof, and marked Exhibit "A".

This defendant alleges and here asserts its lien so filed and perfected in the sum of $4,366.12, together with interest thereon, as a first, prior and paramount lien upon and against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's Complaint, and all improvements, machinery, materials, supplies and equipment thereon.

This defendant here asserts that the said lien in the sum of $4,366.12, together with interest thereon at the rate of 6% per annum from June 1, 1953, until paid, is superior to the claim of lien against any of the said properties of Westmoreland Manganese Corporation by the Plaintiff.

XVI

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph II of plaintiff's Complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant, Westmoreland Manganese Corporation, the sum of $930,751.21, which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00, and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure

of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

XVII

And further answering, this Defendant states that the Plaintiff by the terms of its Contract with the Defendant, Westmoreland, which Contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said Defendant, and is jointly liable to this Defendant, Crow-Burlingame Company, to the extent of its commitment to advance funds for the "development, equipment, and preparation of the above-named property (i.e. deposits owned by Westmoreland, located near Cushman, Arkansas) for the production of manganese ore"; that the Plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland on that basis and for that purpose and not on the basis of an interest-bearing loan secured by a mortgage, as Plaintiff now by its Complaint attempts to make it appear: That the said transactions as between the plaintiff and the defendant, Westmoreland Manganese Corporation, and as set out in the Complaint, were not in the nature of an interest-bearing loan for moneys loaned by the Plaintiff to Westmoreland, and were not intended as such, but were in truth and in fact moneys advanced by the plaintiff to the defendant, Westmoreland Manganese Corporation, for manganese to be delivered by Westmoreland to the plaintiff in the future and after the plant was in production.

This Defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland properties into production of manganese; that the Plaintiff under paragraph 8 of the original Contract of April 7, 1952, with Westmoreland had the

"right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation."

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.*"

And this Defendant states that the Plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this Defendant, and allowed such advances to be used for other purposes, and this Defendant states that the Plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of this Defendant.

XVIII

That Plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of $100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

This defendant further states that the plaintiff by its Contract with Westmoreland was committed to advance to Westmoreland as advance payments against manganese to be produced, moneys up to $3,807,250.00; said moneys to be used for the acquisition and completion of new facilities and to put the properties in the production of manganese, and relying on this commitment and agreement of the plaintiff with Westmoreland, this defendant sold and delivered materials to Westmoreland; that the plaintiff has failed and refused to keep its agreement with Westmoreland and has refused to advance the agreed amount to Westmoreland, and that it stood by and encouraged and allowed this defendant to deliver materials to Westmoreland to the extent of $4,297.32, when it knew, or by the exercise of due care, and by the exercise of the power and authority the plaintiff had attempted to reserve and to contract for, over the purchase of material, equipment and supplies, and the payment therefor, out of funds advanced and to be advanced to Westmoreland, should have known, that it was not going to advance the full amount of the commitment, and on this account the plaintiff is estopped from asserting a lien superior to that of this defendant.

Wherefore, this defendant prays that the alleged "mortgage" sought to be foreclosed in this action by the plaintiff be declared to be invalid and inoperative as a mortgage or as creating a mortgage lien against the properties described therein.

This defendant further prays that its lien claim in the amount of Four Thousand Three Hundred Sixty-Six and 12 100 Dollars ($4,366.12), together with interest until date of payment, attach to the land described in the statement of account and affidavit for lien, Exhibit "A" hereto, and to all of the material, supplies and improvements made upon Westmoreland Manganese Corporation's land in question, in preference to any alleged lien or mortgage lien of the plaintiff upon the land and the machinery, material, supplies or specific improvements, placed or located thereon.

This defendant further prays that its statutory lien be declared to be prior, paramount and superior to the alleged claimed mortgage lien of the plaintiff both as to the improvements on the lands and the lands themselves and that the plaintiff be adjudged to be estopped to assert its lien as a paramount or superior lien to that of this defendant.

CROSS-COMPLAINT

This defendant, Crow-Burlingame Company, as Cross-complainant, for its Cross-complaint herein alleges that the defendant, Westmoreland Manganese Corporation, is indebted to it in the sum of Four Thousand Three Hundred Sixty-six and 12 100 Dollars ($4,366.12), together with interest thereon at the rate of 6% per annum from June 1, 1953, until paid, for which it is entitled to a lien as hereinabove set forth. Certified copies of this defendant's account and affidavit for lien are attached as Exhibit "A" to the Answer and referred to and made Exhibit "A" likewise to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant, Westmoreland Manganese Corporation in the sum of Four Thousand Three Hundred Sixty-six and 12 100 Dollars ($4,366.12), together with interest thereon at the rate of 6% per annum

from June 1, 1953, until paid, and prays that said judgment be declared to be a prior, paramount lien upon the following described property:

The Southwest Quarter (SW¼) of the Northwest Quarter (NW¼) and the North Half (N½) of the Southwest Quarter (SW¼), Section Thirty-one (31), Township Fifteen (15) North, Range Six (6) West, Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

Washer Plant, and the machinery and equipment therein, consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers; six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8-D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

Crow-Burlingame Company
By Barber, Henry & Thurman
By s E. A. Henry
Attorneys for Defendant
1408 Donaghey Building,
Little Rock, Arkansas

SEPARATE ANSWER AND CROSS-COMPLAINT OF MILL & MINE SUPPLY COMPANY

(Filed in U. S. District Court on February 23, 1954)

This Defendant, Mill & Mine Supply Company, for its Separate Answer to the Complaint states:

I

It admits the allegations of paragraph I of the Complaint.

II

It admits the allegations of paragraph II of the Complaint.

III

It admits the allegations of paragraph III of the Complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have the effect alleged by Plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by the defendant, Westmoreland Manganese Corporation, to plaintiff, and denies that there was any such existing indebtedness.

IV

It admits the allegation of paragraph IV of the Complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit "C" to its Complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate and (except as to limited items of personalty specifically designated) does not grant or convey any personal property of sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation, and against which the plaintiff now seeks to have its alleged "mortgage" lien claim enforced. This defendant denies that said alleged "mortgage" created a first lien on the alleged "mortgaged property to secure amounts advanced by the plaintiff to Westmoreland" superior to the statutory lien of this defendant

for materials and supplies furnished by this defendant to Westmoreland. This defendant denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal to or superior to the statutory lien of this defendant.

V

It admits the allegations of paragraph V of the Complaint only as to the execution of the instrument designated as a "Supplemental Mortgage", and referred to as Exhibit "D" to the Complaint, but denies that the same in fact is a valid mortgage, in that it does not grant or convey any real estate, and, (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant, Westmoreland Manganese Corporation, against which the plaintiff now seeks to have its lien claim enforced, and denies that the said alleged mortgage created a mortgage lien that "would take priority over the lien of any mechanic, materialman, laborer or any other statutory lien", and denies that the said "Supplemental Mortgage" created a mortgage lien superior to that of this defendant for material and supplies furnished to Westmoreland, and denies that plaintiff has or is entitled to any lien against any of the property held or owned by the defendant, Westmoreland Manganese Corporation, equal to or superior to the statutory lien of this defendant.

VI

It admits the allegations of paragraph VI of the Complaint.

VII

It admits the allegations of paragraph VII of the Complaint.

VIII

It admits only the execution of the Agreement entitled "Amendment No. 1 to Letter Order No. GS-00P(D)-12263", but denies that it had or was intended to have the effect alleged by the plaintiff; denies that such

Amendment to Letter Order, or any other correspondence between the plaintiff, or any of its agencies, and the defendant, Westmoreland Manganese Corporation, in any manner affected the rights of this defendant to its statutory lien and the superiority thereof, and this defendant states that the said Agreement is void for lack of consideration as between the parties and is void as against this defendant, insofar as it may or as it attempts to defeat this defendant of this statutory lien as hereinafter set forth.

IX

It admits this defendant's claim of lien as alleged in paragraph IX of the Complaint, but states that the lien claimed by this defendant, Mill & Mine Supply Company, in addition to being a mechanic's and or materialman's lien generally as provided by Sections 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947, Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947, Annotated. This Defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

X

It is without information upon which to base a denial or an admission of the allegations of paragraph X of the Complaint.

XI

It is without information upon which to base a denial or an admission of the allegations of paragraph XI of the Complaint.

XII

It is without information upon which to base a denial or an admission of the allegations of paragraph XII of the Complaint.

XIII

It is without information upon which to base a denial or an admission of the allegations of paragraph XIII of the Complaint.

XIV

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant, Westmoreland Manganese Corporation, and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph XIV of the Complaint, this defendant lacks information to either deny or admit.

XV

And further answering, this defendant, Mill & Mine Supply Company, an Arkansas corporation with its principal place of business in the City of Little Rock, in said State, states that between the dates of December 24, 1952, and March 2, 1953, it sold and delivered to the defendant Westmoreland Manganese Corporation, on its direct purchase orders therefor, certain materials and supplies which were furnished for and were used in construction of the plant and buildings of Westmoreland Manganese Corporation, and which are a part of the property against which the plaintiff is now seeking a foreclosure under its alleged "mortgage". That on April 24, 1953, this defendant filed its statement of account and affidavit for lien with the Clerk of the Circuit Court of Independence County, Arkansas, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of the Arkansas Statutes of 1947, Annotated, thereby asserting and preserving its lien for $8,312.69, and interest on the principal amount at 6% per annum from the date of the filing of said affidavit for lien until paid. That said statement of account and affidavit for lien was duly filed in the Office of the Clerk of the Circuit and Chancery Court and Recorder for the County of Independence, State of Arkansas, and now appears of record in the Office of the Circuit Clerk of said County in Book "B", page "W's" of Mechanics Liens. A copy of

the said statement of account and affidavit for lien is attached hereto, made a part hereof, and marked Exhibit "A".

This defendant alleges and here asserts its lien so filed and perfected in the sum of $8,312.69, together with interest thereon, as a first, prior and paramount lien upon and against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's Complaint, and all improvements, machinery, materials, supplies and equipment thereon.

This defendant here asserts that the said lien in the sum of $8,312.69, together with interest thereon at the rate of 6% per annum from April 24, 1953, until paid, is superior to the claim of lien against any of the said properties of Westmoreland Manganese Corporation by the Plaintiff.

XVI

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph II of plaintiff's Complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant, Westmoreland Manganese Corporation, the sum of $930,751.21, which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00, and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failur-

of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

XVII

And further answering, this Defendant states that the Plaintiff by the terms of its Contract with the Defendant, Westmoreland, which Contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said Defendant, and is jointly liable to this Defendant, Mill & Mine Supply Company, to the extent of its commitment to advance funds for the "development, equipment, and preparation of the above-named property (i.e. deposits owned by Westmoreland located near Cushman, Arkansas) for the production of manganese ore"; that the Plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland on that basis and for that purpose and not on the basis of an interest-bearing loan secured by a mortgage, as Plaintiff now by its Complaint attempts to make it appear: That the said transactions as between the plaintiff and the defendant, Westmoreland Manganese Corporation, and as set out in the Complaint, were not in the nature of an interest-bearing loan for moneys loaned by the Plaintiff to Westmoreland, and were not intended as such, but were in truth and in fact moneys advanced by the plaintiff to the defendant, Westmoreland Manganese Corporation, for manganese to be delivered by Westmoreland to the plaintiff in the future and after the plant was in production.

This Defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland properties into production of manganese; that the Plaintiff under paragraph 8 of the original Contract of April 7, 1952, with Westmoreland had the

"right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation."

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.*"

And this Defendant states that the Plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this Defendant, and allowed such advances to be used for other purposes, and this Defendant states that the Plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of this Defendant.

XVIII

That Plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of $100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn, and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

This defendant further states that the plaintiff by its contract with Westmoreland was committed to advance to Westmoreland as advance payments against manganese to be produced, moneys up to $3,807,250.00, said moneys to be used for the acquisition and completion of new facilities and to put the properties in the production of manganese, and relying on this commitment and agreement of the plaintiff with Westmoreland, this defendant sold and delivered materials to Westmoreland; that the plaintiff has failed and refused to keep its agreement with Westmoreland and has refused to advance the agreed amount to Westmoreland, and that it stood by and encouraged and allowed this defendant to deliver materials to Westmoreland to the extent of $8,312.69, when it knew, or by the exercise of due care, and by the exercise of the power and authority the plaintiff had attempted to reserve and to contract for, over the purchase of material, equipment and supplies, and the payment therefor, out of funds advanced and to be advanced to Westmoreland, should have known that it was not going to advance the full amount of the commitment, and on this account the plaintiff is estopped from asserting a lien superior to that of this defendant.

Wherefore, this defendant prays that the alleged "mortgage" sought to be foreclosed in this action by the plaintiff be declared to be invalid and inoperative as a mortgage or as creating a mortgage lien against the properties described therein.

This defendant further prays that its lien claim in the amount of Eight Thousand Three Hundred Twelve and 69/100 Dollars ($8,312.69), together with interest until date of payment, attach to the land described in the statement of account and affidavit for lien, Exhibit "A" hereto, and to all of the material, supplies and improvements made upon Westmoreland Manganese Corporation's land in question, in preference to any alleged lien or mortgage lien of the plaintiff upon the land and the machinery, material, supplies or specific improvements placed or located thereon.

This defendant further prays that its statutory lien be declared to be prior, paramount and superior to the alleged claimed mortgage lien of the plaintiff both as to the improvements on the lands and the lands themselves and that the plaintiff be adjudged to be estopped to assert its lien as a paramount or superior lien to that of this defendant.

CROSS-COMPLAINT

This defendant, Mill & Mine Supply Company, as Cross-complainant, for its Cross-complaint herein alleges that the defendant, Westmoreland Manganese Corporation, is indebted to it in the sum of $8,312.69, together with interest thereon at the rate of 6% per annum from June 1, 1953, until paid, for which it is entitled to a lien as hereinabove set forth. Certified copies of this defendant's account and affidavit for lien are attached as Exhibit "A" to the Answer and referred to and made Exhibit "A" likewise to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant, Westmoreland Manganese Corporation in the sum of Eight Thousand Three Hundred Twelve and 69/100 Dollars ($8,312.69), together with interest thereon at the rate of 6% per annum

from April 24, 1953, until paid, and prays that said judgment be declared to be a prior, paramount lien upon the following described property:

The Southwest Quarter (SW¼) of the Northwest Quarter (NW¼) and the North Half (N½) of the Southwest Quarter (SW¼); Section Thirty-one (31), Township Fifteen (15) North, Range Six (6) West, Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

Washer Plant, and the machinery and equipment therein, consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8-D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

Mill & Mine Supply Company
By Barber, Henry & Thurman
By /s/ E. A. Henry
Attorneys for Defendant
1408 Donaghey Building,
Little Rock, Arkansas

SEPARATE ANSWER AND CROSS-COMPLAINT OF PADGETT LUMBER COMPANY

(Filed in U. S. District Court on February 25, 1954)

This defendant, Padgett Lumber Company, for its Separate Answer to the Complaint states:

1.

It admits the allegations of paragraph I of the Complaint.

2.

It admits the allegations of paragraph II of the Complaint.

3.

It admits the allegations of paragraph III of the Complaint, only as to the execution of the alleged "mortgage note"; but denies that said instrument had, or was intended to have the effect alleged by Plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by the defendant, Westmoreland Manganese Corporation, to plaintiff, and denies that there was any such existing indebtedness.

4.

It admits the allegation of paragraph IV of the Complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit "C" to its Complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate and (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation, and against which the plaintiff now seeks to have its alleged "mortgage" lien claim enforced. This defendant denies that said alleged "mortgage" created a first lien on the alleged "mortgaged property to secure amounts advanced by the plaintiff to West-

moreland" superior to the statutory lien of this defendant for materials and supplies furnished by this defendant to Westmoreland. This defendant denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal to or superior to the statutory lien of this defendant.

5.

It admits the allegations of paragraph V of the Complaint only as to the execution of the instrument designated as a "Supplemental Mortgage", and referred to as Exhibit "D" to the Complaint, but denies that the same in fact is a valid mortgage, in that it does not grant or convey any real estate, and, (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant, Westmoreland Manganese Corporation, against which the plaintiff now seeks to have its lien claim enforced, and denies that the said alleged mortgage created a mortgage lien that "would take priority over the lien of any mechanic, materialman, laborer or any other statutory lien", and denies that the said "Supplemental Mortgage" created a mortgage lien superior to that of this defendant for material and supplies furnished to Westmoreland, and denies that plaintiff has or is entitled to any lien against any of the property held or owned by the defendant, Westmoreland Manganese Corporation, equal to or superior to the statutory lien of this defendant.

6.

It admits the allegations of paragraph VI of the Complaint.

7.

It admits the allegations of paragraph VII of the Complaint.

8.

It admits only the execution of the Agreement entitled "Amendment No. 1 to Letter Order No. GS-

OOP(D)-1226 3", but denies that it had or was intended to have the effect alleged by the plaintiff; denies that such Amendment to Letter Order, or any other correspondence between the plaintiff, or any of its agencies, and the defendant, Westmoreland Manganese Corporation, in any manner affected the rights of this defendant to its statutory lien and the superiority thereof, and this defendant states that the said Agreement is void for lack of consideration as between the parties and is void as against this defendant, insofar as it may or as it attempts to defeat this defendant of this statutory lien as hereinafter set forth.

9.

It admits this defendant's claim of lien as alleged in paragraph IX of the Complaint, but states that the lien claimed by this defendant, Padgett Lumber Company, in addition to being a mechanic's and or materialman's lien generally as provided by Sections 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947, Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947, Annotated. This Defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

10.

It is without information upon which to base a denial or an admission of the allegations of paragraph X of the Complaint.

11.

It is without information upon which to base a denial or an admission of the allegations of paragraph XI of the Complaint.

12.

It is without information upon which to base a denial or an admission of the allegations of paragraph XII of the Complaint.

13.

It is without information upon which to base a denial or an admission of the allegations of paragraph XIII of the Complaint.

14.

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant, Westmoreland Manganese Corporation, and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph XIV of the Complaint, this defendant lacks information to either deny or admit.

15.

Further answering, this defendant, Padgett Lumber Company, a corporation organized and existing under the laws of the State of Arkansas, between November 2, 1952, and February 25, 1953, both inclusive, sold and delivered to the defendant Westmoreland Manganese Corporation material for Westmoreland Manganese Corporation under direct purchase order as set forth in Exhibit "A" made a part of this defendant's Account of Materialman's Lien duly filed with the Clerk of the Circuit Court of Independence County, Arkansas, April 17, 1953, and amendment thereto filed May 6, 1953, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated, thereby asserting and preserving its lien for $3,866.20 and interest against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's complaint and all improvements, machinery and equipment thereon.

This defendant here asserts its said lien in the sum of $3,866.20 together with interest thereon at the rate of six per centum per annum from April 17, 1953, until paid, superior to the claim of lien against any of said properties of Westmoreland Manganese Corporation by the plaintiff.

16.

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph II of plaintiff's Complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintifff failed and refused to pay over or make available to the defendant, Westmoreland Manganese Corporation, the sum of $930,751.21, which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00, and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

17.

And further answering, this Defendant states that the Plaintiff by the terms of its Contract with the De-

fendant, Westmoreland, which Contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said Defendant, and is jointly liable to this Defendant, Padgett Lumber Company, to the extent of its commitment to advance funds for the "development, equipment, and preparation of the above-named property (i.e. deposits owned by Westmoreland located near Cushman, Arkansas) for the production of manganese ore"; that the Plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland on that basis and for that purpose and not on the basis of an interest-bearing loan secured by a mortgage, as Plaintiff now by its Complaint attempts to make it appear: That the said transactions as between the plaintiff and the defendant, Westmoreland Manganese Corporation, and as set out in the Complaint, were not in the nature of an interest-bearing loan for moneys loaned by the Plaintiff to Westmoreland, and were not intended as such, but were in truth and in fact moneys advanced by the plaintiff to the defendant, Westmoreland Manganese Corporation, for manganese to be delivered by Westmoreland to the plaintiff in the future and after the plant was in production.

This Defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland properties into production of manganese; that the Plaintiff under paragraph 8 of the original Contract of April 7, 1952, with Westmoreland had the

> "right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation."

And under paragraphs 5(a) (b), and (c) of the said Contract it was provided as follows:

> "(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made

by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.*"

And this Defendant states that the Plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this Defendant, and allowed such advances to be used for other purposes, and this Defendant states that the Plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of this Defendant.

18.

That Plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of $100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

Wherefore, this defendant prays that its lien in the amount of $3,866.20 together with interest thereon at the rate of six per centum per annum from April 17, 1953, until paid be held to have attached as of date of delivery of said materials to the land and mineral titles to land and to the machinery, materials, supplies and specific improvements upon the lands and mineral titles to lands of Westmoreland Manganese Corporation set forth in plaintiff's alleged mortgages, in preference to any lien or claim of lien of the plaintiff.

19.

CROSS-COMPLAINT

This defendant, Padgett Lumber Company, as Cross-complainant, for its Cross-complaint herein alleges that the defendant, Westmoreland Manganese Corporation, is indebted to it in the sum of $3,866.20, together with interest thereon at the rate of 6% per annum from April 17, 1953, until paid, for which it is entitled to a lien as hereinabove set forth. Certified copies of this defendant's Account for Lien being attached to and filed herewith and made a part hereof as Exhibit "A" to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant, Westmoreland Manganese Corporation in the sum of Three Thousand Eight Hundred Sixty-six and 20 100 Dollars ($3,866.20), together with interest thereon at the rate of 6% per annum from April 17, 1953, until paid, and prays that said judgment be declared to be a prior, paramount lien upon the following described property:

The Southwest Quarter (SW¼) of the Northwest Quarter (NW¼) and the North Half (N½) of the Southwest Quarter (SW¼), Section Thirty-one (31), Township Fifteen (15) North, Range Six (6) West, Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

WASHER PLANT, and the machinery and equipment therein, consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8-D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

PAIGETT LUMBER COMPANY
By J. J. McCaleb and
W. D. Murphy
Its Attorneys

SEPARATE ANSWER AND CROSS-COMPLAINT OF GENERAL STEEL PRODUCTS COMPANY

(Filed in U. S. District Court on February 25, 1954)

This defendant, General Steel Products Company, for its Separate Answer to the Complaint of plaintiff in the above styled action, states:

1.

It admits the allegations of paragraph 1 of the Complaint.

2.

It admits the allegations of paragraph 2 of the Complaint.

3.

It admits the allegations of paragraph 3 of the Complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have the effect alleged by Plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by the defendant, Westmoreland Manganese Corporation, to plaintiff, and denies that there was any such existing indebtedness.

4.

It admits the allegations of paragraph 4 of the Complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit "C" to its Complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate and (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation, and against which the plaintiff now seeks to have its alleged "mortgage" lien claim enforced. That Plaintiff had the right and opportunity to have executed to it mortgages which were definite and

specific as to the particular property to be mortgaged, but neglected and failed to do so. Denies that plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal to or superior to the statutory lien of this defendant.

5.

It admits the allegations of paragraph 5 of the Complaint only as to the execution of the instrument designated as a "Supplemental Mortgage", and referred to as Exhibit "D" to the Complaint, but denies that the same in fact is a valid mortgage, in that it does not grant or convey any real estate, and, (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant, Westmoreland Manganese Corporation, against which the plaintiff now seeks to have its lien claim enforced, and denies that plaintiff has or is entitled to any lien against any of the property held or owned by the defendant, Westmoreland Manganese Corporation, equal to or superior to the statutory lien of this defendant.

6.

It admits the allegations of paragraph 6 of the Complaint.

7.

It admits the allegations of paragraph 7 of the Complaint.

8.

It admits only the execution of the paper referred to in paragraph 8 of the complaint as "Amendment No. 1 to Letter Order No. GS-OOP(D)-12263", but denies that it had or was intended to have the effect alleged by the plaintiff; denies that such Amendment to Letter Order or any other correspondence between the plaintiff, or any of its agencies, and the defendant, Westmoreland Manganese Corporation, in any manner affected the rights of

this defendant to its statutory lien and the superiority thereof.

9.

It admits this defendant's claim of lien as alleged in paragraph 9 of the complaint, but states that the lien claimed by this defendant, General Steel Products Company, in addition to being a mechanic's and/or materialman's lien generally as provided by Sections 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947, Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947, Annotated. This Defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

10.

It is without information upon which to base a denial or an admission of the allegations of paragraph 10 of the Complaint.

11.

It is without information upon which to base a denial or an admission of the allegations of paragraph 11 of the Complaint.

12.

It is without information upon which to base a denial or an admission of the allegations of paragraph 12 of the Complaint.

13.

It is without information upon which to base a denial or an admission of the allegations of paragraph 13 of the Complaint.

14.

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant, Westmoreland Manganese Corporation, and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph 14 of the Complaint, this defendant lacks information to either deny or admit.

15.

Further answering, this defendant General Steel Products Company, a corporation organized and existing under the laws of the State of Missouri, between the 3rd day of January, 1953, and the 4th day of March, 1953, both inclusive, sold and delivered to the defendant Westmoreland Manganese Corporation certain material, same being so sold and delivered upon the direct purchase order given by said Westmoreland Manganese Corporation to this defendant General Steel Products Company as set forth in Exhibit "A" made a part of this defendant's Account of Materialman's Lien duly filed with the Clerk of the Circuit Court of Independence County, Arkansas, May 25, 1953, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated, thereby assenting and preserving its lien for $15,925.62 and interest against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's complaint and all improvements, machinery and equipment thereon.

This defendant here asserts its said lien in the sum of $15,925.62 together with interest thereon at the rate of six per centum per annum from May 25, 1953, until paid, superior to the claim of lien against any of said properties of Westmoreland Manganese Corporation by the plaintiff or any other defendant herein.

16.

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph 2 of plaintiff's Complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant, Westmoreland Manganese Corporation, the sum of $930,751.21, which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00, and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant: That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

17.

And further answering, this Defendant states that the Plaintiff by the terms of its Contract with the Defendant, Westmoreland, which Contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said Defendant, and is jointly liable to this Defendant, General Steel Products Company, to the extent of its commitment to advance funds for the "development, equipment, and preparation of the above-named property (i.e. deposits owned by West-

moreland located near Cushman, Arkansas) for the production of manganese ore"; that the Plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland on that basis and for that purpose and not on the basis of an interest-bearing loan secured by a mortgage, as Plaintiff now by its Complaint attempts to make it appear: That the said transactions as between the plaintiff and the defendant, Westmoreland Manganese Corporation, and as set out in the Complaint, were not in the nature of an interest-bearing loan for moneys loaned by the Plaintiff to Westmoreland, and were not intended as such, but were in truth and in fact moneys advanced by the plaintiff to the defendant, Westmoreland Manganese Corporation, for manganese to be delivered by Westmoreland to the plaintiff in the future and after the plant was in production.

This Defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland properties into production of manganese; that the Plaintiff under paragraph 8 of the original Contract of April 7, 1952, with Westmoreland had the

> "right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation."

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

> "(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.*"

And this Defendant states that the Plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this Defendant, and allowed such advances to be used for other purposes, and this Defendant states that the Plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of this Defendant.

18.

That Plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of $100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That

plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

Wherefore, this defendant prays that its lien in the amount of $15,925.62 together with interest thereon at the rate of six per centum per annum from May 23, 1953, until paid be held to have attached as of date of delivery of said materials to the land and mineral titles to land and to the machinery, materials, supplies and specific improvements upon the lands and mineral titles to lands of Westmoreland Manganese Corporation set forth in plaintiff's alleged mortgages, in preference to any lien or claim of lien of the plaintiff.

19.

CROSS-COMPLAINT

This defendant, General Steel Products Company, as Cross-complainant, for its Cross-complaint herein alleges that the defendant, Westmoreland Manganese Corporation, is indebted to it in the sum of $15,925.62, together with interest thereon at the rate of 6% per annum from May 23, 1953, until paid, for which it is entitled to a lien as hereinabove set forth. Certified copies of this defendant's Account for Lien being attached to and filed herewith and made a part hereof as Exhibit "A" to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant, Westmoreland Manganese Corporation in the sum of $15,925.62 together with interest thereon at the rate of 6% per annum from May 23, 1953, until paid, and prays that said judgment be declared to be a prior, paramount lien upon the following described property:

The Southwest Quarter ($SW\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) and the North Half ($N\frac{1}{2}$)

of the Southwest Quarter (SW¼), Section Thirty-one (31), Township Fifteen (15) North, Range Six (6) West, Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

WASHER PLANT, and the machinery and equipment therein, consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8-D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

GENERAL STEEL PRODUCTS COMPANY
By W. D. Murphy
J. J. McCaleb
Its Attorneys

SEPARATE ANSWER AND CROSS-COMPLAINT OF IRA SHERRILL

(Filed in U. S. District Court on February 25, 1954)

This defendant, Ira Sherill, for his Separate Answer to the complaint of plaintiff in the above styled action, states:

1.

He admits the allegations of paragraph 1 of the complaint.

2.

He admits the allegations of paragraph 2 of the complaint.

3.

He admits the allegations of paragraph 3 of the complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have, the effect alleged by plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by defendant Westmoreland Manganese Corporation to plaintiff, and denies that there was any such existing indebtedness.

4.

He admits the allegation of paragraph 4 of the complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit C to its complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation and against which plaintiff now seeks to have its lien claim enforced. That plaintiff had the right and opportunity to have executed to it mortgages which were definite and specific as to the particular property to be mortgaged, but neglected and failed to do so. Denies that plaintiff has or is entitled to any lien against

any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

5.

He admits the allegations of paragraph 5 of the complaint only as to the execution of the instrument designated as a "supplemental Mortgage" and referred to as Exhibit D to the complaint, but denies that same in fact is a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant Westmoreland Manganese Corporation against which the plaintiff now seeks to have its lien claim enforced. Denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

6.

He admits the allegations of paragraph 6 of the complaint.

7.

He admits the allegations of paragraph 7 of the complaint.

8.

He admits only the execution of the paper referred to in paragraph 8 of the complaint as "Amendment No. 1 to Letter Order GS-00P(D)-12263", but denies that it had or was intended to have the effect alleged by the plaintiff; denies that such "Amendment to Letter Order", or any other correspondence between the plaintiff or any of its agencies and the defendant Westmoreland Manganese Corporation in any manner affected the rights of this defendant to its statutory lien and the superiority thereof.

9.

He admits this defendant's claim of lien as alleged in paragraph 9 of the complaint, but states that the lien

claimed by this defendant, Ira Sherrill in addition to being a mechanic's and or materialman's lien generally as provided by 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947 Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated. This defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

10.

That this defendant lacks information to either deny or admit the allegations of paragraph 10 of the complaint.

11.

This this defendant lacks information to either deny or admit the allegations of paragraph 11 of the complaint.

12.

That this defendant lacks information to either deny or admit the allegations of paragraph 12 of the complaint.

13.

That this defendant lacks information to either deny or admit the allegations of paragraph 13 of the complaint.

14.

He admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant Westmoreland Manganese Corporation and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph 14 of the complaint this defendant lacks information to either deny or admit.

15.

Further answering, this defendant Ira Sherrill, between the 9th day of December, 1952, and the 22nd day of January, 1953, both inclusive, furnished and delivered to the defendant Westmoreland Manganese Corporation cer-

tain labor and material, same being so performed, sold and delivered upon the direct purchase order given by said Westmoreland Manganese Corporation to this defendant Ira Sherrill as set forth in Exhibit "A" made a part of this defendant's Account of Materialman's Lien duly filed with the Clerk of the Circuit Court of Independence County, Arkansas, May 25, 1953, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated, thereby asserting and preserving his lien for $362.50 and interest against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's complaint and all improvements, machinery and equipment thereon.

This defendant here asserts its said lien in the sum of $362.50 together with interest thereon at the rate of six per centum per annum from January 22, 1953, until paid, superior to the claim of lien against any of said properties of Westmoreland Manganese Corporation by the plaintiff.

16.

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph 2 of plaintiff's complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant Westmoreland Manganese Corporation the sum of $30,751.21 which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00

and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

17.

And further answering, this defendant states that the plaintiff by the terms of its Contract with the Defendant, Westmoreland Manganese Corporation, which contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said defendant, and is jointly liable to this defendant, Ira Sherrill, to the extent of its commitment to advance funds for the "development, equipments, and preparation of the above-named property (i.e. deposits owned by Westmoreland Manganese Corporation located near Cushman, Arkansas) for the production of manganese ore"; that the plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland Manganese Corporation on that basis and for that purpose and not on the basis of an interest bearing loan secured by a mortgage, as plaintiff now by its complaint attempts to make it appear.

This defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland Manganese Corporation properties into production of manganese; that the Plaintiff under paragraph 8(c) of the original Contract of April 7, 1952, with Westmoreland Manganese Corporation had the

> "right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation".

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein.* Such mortgages are to be in the form and of the substances prescribed or approved by the Government."

And this defendant states that the plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this defendant, and allowed such advances to be used for other purposes, and this defendant states that the plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of the defendant.

18.

That plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of

$100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

Wherefore, this defendant prays that its lien in the amount of $362.50 together with interest thereon at the rate of six per centum per annum from January 22, 1953, until paid be held to have attached as of date of delivery of said materials to the land, and mineral titles to land and to the machinery, materials, supplies and specific improvements upon the lands and mineral titles to lands of Westmoreland Manganese Corporation set forth in plaintiff's alleged mortgages, in preference to any lien or claim of lien of the plaintiff.

19.

CROSS-COMPLAINT

This defendant, Ira Sherrill, as Cross-complainant, for his cross-complaint herein alleges that the defendant Westmoreland Manganese Corporation is indebted to it in the sum of $362.50 together with interest thereon at the rate of six per centum per annum from January 22, 1953, until paid, and for which he is entitled to liens as herein above set forth. Certified copy of this defendant's Account for Lien being attached to and filed herewith and made a part hereof as Exhibit "A" to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant Westmoreland Manganese Corporation in the sum of $362.50 together

with interest thereon at the rate of six per centum per annum from January 22, 1953, until paid, and prays that said judgment be declared to be a prior and paramount lien upon the following described property:

The Southwest Quarter of the Northwest Quarter, and the North Half of the Southwest Quarter of Section 31, Township 15 North, Range 6 West in Independence County, Arkansas, together with all other lands and mineral titles ~~to lands~~ as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

Washer Plant, and the machinery and equipment therein consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 30 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8-D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to the payment of this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

Ira Sherrill

s W. D. Murphy

s By J. J. McCaleb

Its Attorneys

SEPARATE ANSWER AND CROSS-COMPLAINT OF CHOCTAW, INC.

(Filed in U. S. District Court on February 25, 1954)

This defendant, Choctaw, Inc., for his Separate Answer to the complaint of plaintiff in the above styled action, states: It is a corporation existing under the laws of the State of Tennessee.

1.

It admits the allegations of paragraph 1 of the complaint.

2.

It admits the allegations of paragraph 2 of the complaint.

3.

It admits the allegations of paragraph 3 of the complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have, the effect alleged by plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by defendant Westmoreland Manganese Corporation to plaintiff, and denies that there was any such existing indebtedness.

4.

It admits the allegation of paragraph 4 of the complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit C to its complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation and against which plaintiff now seeks to have its lien claim enforced. That plaintiff had the right and opportunity to have executed to it mortgages which were definite and specific as to the particular property to be mortgaged, but neglected and failed to do so. Denies that plaintiff has or is entitled to any lien against

any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

5.

It admits the allegations of paragraph 5 of the complaint only as to the execution of the instrument designated as a "supplemental Mortgage" and referred to as Exhibit D to the complaint, but denies that same in fact is a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant Westmoreland Manganese Corporation against which the plaintiff now seeks to have its lien claim enforced. Denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

6.

It admits the allegations of paragraph 6 of the complaint.

7.

It admits the allegations of paragraph 7 of the complaint.

8.

It admits only the execution of the paper referred to in paragraph 8 of the complaint as "Amendment No. 1 to Letter Order GS-OOP(D)-12263", but denies that it had or was intended to have the effect alleged by the plaintiff; denies that such "Amendment to Letter Order", or any other correspondence between the plaintiff or any of its agencies and the defendant Westmoreland Manganese Corporation in any manner affected the rights of this defendant to its statutory lien and the superiority thereof.

9.

It admits this defendant's claim of lien as alleged in paragraph 9 of the complaint, but states that the lien

claimed by this defendant, Choctaw, Inc., in addition to being a mechanic's and/or materialman's lien generally as provided by 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947 Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated. This defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

10.

That this defendant lacks information to either deny or admit the allegations of paragraph 10 of the complaint.

11.

This this defendant lacks information to either deny or admit the allegations of paragraph 11 of the complaint.

12.

That this defendant lacks information to either deny or admit the allegations of paragraph 12 of the complaint.

13.

That this defendant lacks information to either deny or admit the allegations of paragraph 13 of the complaint.

14.

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant Westmoreland Manganese Corporation and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph 14 of the complaint this defendant lacks information to either deny or admit.

15.

Further answering, this defendant Choctaw, Inc., between the 2nd day of January, 1953, and the 5th day of February, 1953, both inclusive, furnished and delivered to the defendant Westmoreland Manganese Corporation cer-

tain labor and material, same being so performed, sold and delivered upon the direct purchase order given by said Westmoreland Manganese Corporation to this defendant Choctaw, Inc., as set forth in Exhibit "A" made a part of this defendant's Account of Materialman's Lien duly filed with the Clerk of the Circuit Court of Independence County, Arkansas, May 25, 1953, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated, thereby asserting and preserving his lien for $3,086.29 and interest against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's complaint and all improvements, machinery and equipment thereon.

This defendant here asserts its said lien in the sum of $3,086.29 together with interest thereon at the rate of six per centum per annum from February 5, 1953, until paid, superior to the claim of lien against any of said properties of Westmoreland Manganese Corporation by the plaintiff.

16.

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph 2 of plaintiff's complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant Westmoreland Manganese Corporation the sum of $930,751.21 which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00

and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

17.

And further answering, this defendant states that the plaintiff by the terms of its Contract with the Defendant, Westmoreland Manganese Corporation, which contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said defendant, and is jointly liable to this defendant, Choctaw, Inc., to the extent of its commitment to advance funds for the "development, equipments, and preparation of the above-named property (i.e. deposits owned by Westmoreland Manganese Corporation located near Cushman; Arkansas) for the production of manganese ore"; that the plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland Manganese Corporation on that basis and for that purpose and not on the basis of an interest bearing loan secured by a mortgage, as plaintiff now by its complaint attempts to make it appear.

This defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland Manganese Corporation properties into production of manganese; that the Plaintiff under paragraph 8(c) of the original Contract of April 7, 1952, with Westmoreland Manganese Corporation had the

> "right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation".

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein.* Such mortgages are to be in the form and of the substances prescribed or approved by the Government."

And this defendant states that the plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this defendant, and allowed such advances to be used for other purposes, and this defendant states that the plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of the defendant.

18.

That plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of

$100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

Wherefore, this defendant prays that its lien in the amount of $3,086.29, together with interest thereon at the rate of six per centum per annum from February 5, 1953, until paid be held to have attached as of date of delivery of said materials to the land and mineral titles to land and to the machinery, materials, supplies and specific improvements upon the lands and mineral titles to lands of Westmoreland Manganese Corporation set forth in plaintiff's alleged mortgages, in preference to any lien or claim of lien of the plaintiff.

19.

CROSS-COMPLAINT

This defendant, Choctaw, Inc., as Cross-complainant for its cross-complaint herein alleges that the defendant Westmoreland Manganese Corporation is indebted to it in the sum of $3,086.29 together with interest thereon at the rate of six per centum per annum from February 5, 1953, until paid, and for which he is entitled to liens as hereinabove set forth. Certified copy of this defendant's Account for Lien being attached to and filed herewith and made a part hereof as Exhibit "A" to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant Westmoreland Manganese Corporation in the sum of $3,086.29 together

with interest thereon at the rate of six per centum per annum from February 5, 1952 until paid, and prays that said judgment be declared to be a prior and paramount lien upon the following described property:

The Southwest Quarter of the Northwest Quarter, and the North Half of the Southwest Quarter of Section 31, Township 15 North, Range 6 West in Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

Washer Plant, and the machinery and equipment therein consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low-head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8-D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to the payment of this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

Choctaw, Ixcy

/s/ By J. J. McCaleb

/s/ W. D. Murphy

Its Attorneys

SEPARATE ANSWER AND CROSS-COMPLAINT OF JEFFERY LUMBER COMPANY

(Filed in U. S. District Court on February 25, 1954)

This defendant, Jeffery Lumber Company, for its Separate Answer to the complaint of plaintiff in the above styled action, states: It is a corporation organized and existing under the laws of the State of Arkansas.

1.

It admits the allegations of paragraph 1 of the complaint.

2.

It admits the allegations of paragraph 2 of the complaint.

3.

It admits the allegations of paragraph 3 of the complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have, the effect alleged by plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by defendant Westmoreland Manganese Corporation to plaintiff, and denies that there was any such existing indebtedness.

4.

It admits the allegation of paragraph 4 of the complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit C to its complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation and against which plaintiff now seeks to have its lien claim enforced. That plaintiff had the right and opportunity to have executed to it mortgages which were definite and specific as to the particular property to be mortgaged, but neglected and failed to do so. Denies that plaintiff has or is entitled to any lien against

any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

5.

It admits the allegations of paragraph 5 of the complaint only as to the execution of the instrument designated as a "supplemental Mortgage" and referred to as Exhibit D to the complaint, but denies that same in fact is a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant Westmoreland Manganese Corporation against which the plaintiff now seeks to have its lien claim enforced. Denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

6.

It admits the allegations of paragraph 6 of the complaint.

7.

It admits the allegations of paragraph 7 of the complaint.

8.

It admits only the execution of the paper referred to in paragraph 8 of the complaint as "Amendment No. 1 to Letter Order GS-OOP(D)-12263", but denies that it had or was intended to have the effect alleged by the plaintiff; denies that such "Amendment to Letter Order", or any other correspondence between the plaintiff or any of its agencies and the defendant Westmoreland Manganese Corporation in any manner affected the rights of this defendant to its statutory lien and the superiority thereof.

9.

It admits this defendant's claim of lien as alleged in paragraph 9 of the complaint, but states that the lien

claimed by this defendant, Jeffery Lumber Co., in addition to being a mechanic's and or materialman's lien generally as provided by 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947 Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated. This defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

10.

That this defendant lacks information to either deny or admit the allegations of paragraph 10 of the complaint.

11.

This this defendant lacks information to either deny or admit the allegations of paragraph 11 of the complaint.

12.

That this defendant lacks information to either deny or admit the allegations of paragraph 12 of the complaint.

13.

That this defendant lacks information to either deny or admit the allegations of paragraph 13 of the complaint.

14.

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant Westmoreland Manganese Corporation and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph 14 of the complaint this defendant lacks information to either deny or admit.

15.

Further answering, this defendant Jeffery Lumber Co., between the 3rd day of December, 1952, and the 9th day of February, 1953, both inclusive, furnished and delivered to the defendant Westmoreland Manganese Corporation cer-

tain labor and material, same being so performed, sold and delivered upon the direct purchase order given by said Westmoreland Manganese Corporation to this defendant Jeffery Lumber Co., as set forth in Exhibit "A" made a part of this defendant's Account of Materialman's Lien duly filed with the Clerk of the Circuit Court of Independence County, Arkansas, May 25, 1953, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated, thereby asserting and preserving its lien for $2,157.55 and interest against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's complaint and all improvements, machinery and equipment thereon.

This defendant here asserts its said lien in the sum of $2,157.55 together with interest thereon at the rate of six per centum per annum from February 9, 1953, until paid, superior to the claim of lien against any of said properties of Westmoreland Manganese Corporation by the plaintiff.

16.

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph 2 of plaintiff's complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant Westmoreland Manganese Corporation the sum of $30,751.21 which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00

and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

17.

And further answering, this defendant states that the plaintiff by the terms of its Contract with the Defendant, Westmoreland Manganese Corporation, which contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said defendant, and is jointly liable to this defendant, Jeffery Lumber Co., to the extent of its commitment to advance funds for the "development, equipments, and preparation of the above-named property (i.e. deposits owned by Westmoreland Manganese Corporation located near Cushman, Arkansas) for the production of manganese ore"; that the plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland Manganese Corporation on that basis and for that purpose and not on the basis of an interest bearing loan secured by a mortgage, as plaintiff now by its complaint attempts to make it appear.

This defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland Manganese Corporation properties into production of manganese; that the Plaintiff under paragraph 8(c) of the original Contract of April 7, 1952, with Westmoreland Manganese Corporation had the

> "right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation".

And under paragraphs 5(a) (b) and (c) of the said contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein.* Such mortgages are to be in the form and of the substances prescribed or approved by the Government."

And this defendant states that the plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this defendant, and allowed such advances to be used for other purposes, and this defendant states that the plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of the defendant.

18.

That plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of

$100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

Wherefore, this defendant prays that its lien in the amount of $2,157.55 together with interest thereon at the rate of six per centum per annum from February 9, 1953 until paid be held to have attached as of date of delivery of said materials to the land and mineral titles to land and to the machinery, materials, supplies and specific improvements upon the lands and mineral titles to lands of Westmoreland Manganese Corporation set forth in plaintiff's alleged mortgages, in preference to any lien or claim of lien of the plaintiff.

19.

CROSS-COMPLAINT

This defendant, Jeffery Lumber Company, as Cross-complainant, for its cross-complaint herein alleges that the defendant Westmoreland Manganese Corporation is indebted to it in the sum of $2,157.55 together with interest thereon at the rate of six per centum per annum from February 9, 1953, until paid, and for which he is entitled to liens as hereinabove set forth. Certified copy of this defendant's Account for Lien being attached to and filed herewith and made a part hereof as Exhibit "A" to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant Westmoreland Manganese Corporation in the sum of $2,157.55 together

with interest thereon at the rate of six per centum per annum from February 9, 1953, until paid, and prays that said judgment be declared to be a prior and paramount lien upon the following described property:

The Southwest Quarter of the Northwest Quarter, and the North Half of the Southwest Quarter of Section 31, Township 15 North, Range 6 West in Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

Washer Plant, and the machinery and equipment therein consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie scraper, two Caterpillar S D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to the payment of this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

Jeffery Lumber Company

s W. D. Murphy

s By J. J. McCalgh

Its Attorneys

SEPARATE ANSWER AND CROSS-COMPLAINT OF BRAGG'S ELECTRIC CONSTRUCTION COMPANY

(Filed in U. S. District Court on February 26, 1954)

The defendant, Bragg's Electric Construction Company, for its Separate Answer to the Complaint, states:

I

This defendant admits the allegations of paragraph I of the Complaint.

II

This defendant admits the allegations of paragraph II of the Complaint.

III

This defendant admits the execution of the "Mortgage Note" mentioned in paragraph III of the Complaint, but denies that the indebtedness evidenced by such "Mortgage Note" ever existed as a valid debt owing by the defendant, Westmoreland Manganese Corporation, to the plaintiff.

IV

This defendant admits the execution of the "Real Estate and Chattel Mortgage" mentioned in paragraph IV of the Complaint, but denies that such mortgage was, in fact and in law, a valid conveyance or mortgage on the property owned by the defendant, Westmoreland Manganese Corporation; and specifically this defendant denies that such mortgage created any lien against any of the property held or owned by Westmoreland Manganese Corporation, which lien is equal or prior to the statutory lien of this defendant.

V

This defendant admits the execution of the "Supplemental Mortgage" mentioned in paragraph V of the Complaint, but denies that such instrument is a valid mortgage, and specifically denies that such instrument created any mortgage lien which would take priority over the lien of

any mechanic, materialman, laborer, or any other statutory lien, and further specifically denies that such instrument created any lien on any of the property of the defendant, Westmoreland Manganese Corporation, which lien is equal or prior to the statutory lien of this defendant.

VI

This defendant admits the allegations of paragraph VI of the Complaint.

VII

This defendant admits the allegations of paragraph VII of the Complaint.

VIII

This defendant admits the execution of the agreement entitled "Amendment No. 1 to Letter Order No. GS-00P(D)-12263" but denies that after the execution thereof plaintiff made advances of money to defendant, Westmoreland Manganese Corporation, and specifically denies that the execution of said agreement in any manner affected the rights of this defendant to its statutory lien, or the priority thereof; and this defendant further specifically states that such agreement is void and of no force and effect insofar as it attempts to effect the validity and superiority of the statutory lien of this defendant.

IX

This defendant admits, as alleged in paragraph IX(a), that it filed a statutory lien against certain properties of the defendant, Westmoreland Manganese Corporation, as said properties are more specifically hereinafter described, in the amount of $15,780.13, but denies that its rights under such statutory lien are subsequent, inferior or subordinate to the rights of the plaintiff, and specifically this defendant states that its said statutory lien is prior, paramount and superior to plaintiff's claim of lien. This defendant does not have sufficient information upon which to base a denial or admission as to the remainder of the allegations of paragraph IX of the Complaint.

X

This defendant does not have sufficient information upon which to base a denial or admission of the allegations in paragraph X of the Complaint.

XI

This defendant does not have sufficient information upon which to base a denial or admission of the allegations in paragraph XI of the Complaint.

XII

This defendant does not have sufficient information upon which to base a denial or admission of the allegations in paragraph XII of the Complaint.

XIII

This defendant does not have sufficient information upon which to base a denial or admission of the allegations in paragraph XIII of the Complaint.

XIV

This defendant does not have sufficient information either to deny or admit the allegations of paragraph XIV of the Complaint.

XV

Further answering, this defendant states that the mortgages which plaintiff now seeks to foreclose were executed as part of the consideration for the contract, designated Exhibit "A" to the Complaint, between the plaintiff and defendant, Westmoreland Manganese Corporation, and that plaintiff has breached the terms thereof and refused to advance the funds as provided in said contract; and that by the failure of the plaintiff to perform the covenants and agreements contained in said contract with Westmoreland Manganese Corporation plaintiff's mortgage became inoperative and of no force and effect.

XVI

Further answering, this defendant states that by irtue of the agreements between plaintiff and defendant, Westmoreland Manganese Corporation, and particularly y paragraph 5 of the agreement designated Exhibit "A" o the Complaint, plaintiff, for the benefit of this defend- nt, contracted to advance sums to pay for the cost of quipping the new facilities for the mining, production nd processing of manganese ore; and that a written re- uest for an advance sufficient to pay the indebtedness ff prior to its termination of such agreement, and defend- ff prior to its termination of such agreement ,and defend- nt's rights, as a beneficiary of such contract, are superior plaintiff's rights under its alleged mortgages, and plain- ff can not now assert any rights superior to this defend- nt's statutory lien foreclosure of which is sought in this efendant's Cross-complaint.

XVII

Further answering, this defendant states that on sev- ral occasions the duly authorized representatives of plain- ff assured this defendant that plaintiff had segregated om the general funds owing to defendant, Westmoreland anganese Corporation, under the Mortgage Note afore- id, an amount sufficient to pay directly to this defendant r all electrical work and supplies furnished by this de- ndant to Westmoreland Manganese Corporation, and that xcept for such express representations and assurances is defendant would have terminated its contract with the efendant, Westmoreland Manganese Corporation; but- lying upon such express representations by plaintiff at plaintiff would make direct payment for all such work, bor and materials, this defendant continued the perform- nce of its contract for installation of electrical facilities the new plant of the defendant, Westmoreland Mangan- se Corporation, and plaintiff is now estopped to claim y lien superior to the statutory lien of this defendant.

Wherefore, this defendant prays that the mortgage ought to be foreclosed in this action by plaintiff be de- ared to be invalid and inoperative, or alternatively that

said mortgage be adjudged second, subordinate and inferior to the statutory lien of this defendant, or alternatively that the plaintiff be adjudged to be estopped to assert any lien by virtue of such mortgage which would be superior to the statutory lien of this defendant.

CROSS-COMPLAINT

The defendant, Bragg's Electric Construction Company, as Cross-complainant, for its cause of action against the defendant, Westmoreland Manganese Corporation, alleges:

I

That on October 1, 1952, defendant, Westmoreland Manganese Corporation (a corporation under the laws of the State of Maryland) and Bragg's Electric Construction Company (a corporation under the laws of the State of Arkansas) entered into a contract whereby Cross-complainant agreed to furnish labor, supervision and materials for the installation of electrical equipment in connection with the construction by defendant, Westmoreland Manganese Corporation, of a manganese plant, which construction and improvements are designated and known as the Washer Building, Dutch Cyclone and Heavy Media Building, Pump House, Cafe, and Multi-Quonset Building, and this Cross-complainant also furnished and installed a Pole Line and Transformer Bank used in connection with the construction of the aforesaid manganese plant, all of such improvements, construction and electrical installations being now located upon the following described land in Independence County, Arkansas, to-wit:

> The Southwest Quarter (SW^1_4) of the Northwest Quarter (NW^1_4) and the North Half (N^1_2) of the Southwest Quarter (SW^1_4) of Section 31, Township 15 North, Range 6 West;

II

That under and pursuant to the terms of said contract, Cross-complainant did furnish to said defendant, West-

moreland Manganese Corporation, labor, materials, electrical equipment and supplies used in the construction of the aforesaid improvements, and are now incorporated in and constitute a part of such improvements located upon the above described lands.

III

That such labor and materials aforesaid were furnished in the total amount of Sixty-nine Thousand Nine Hundred One and 72/100 Dollars ($69,901.72), and that there has been paid toward the satisfaction thereof only the sum of Fifty-four Thousand Two Hundred One and 59/100 Dollars ($54,201.59), leaving a balance thereof now due and owing by said defendant to Cross-complainant in the sum of Fifteen Thousand Seven Hundred and 13/100 Dollars ($15,700.13), together with interest thereon at the rate of six per cent (6%) per annum from June 2, 1953, until paid.

IV

That on June 2, 1953, Cross-complainant duly filed with the Circuit Clerk and Ex-Officio Recorder of Independence County, Arkansas, its verified account and affidavit for lien, and said lien is now of record therein in Book "B", under "W". A copy of said lien and account is attached hereto, marked Exhibit "A", and made a part hereof. That the aforesaid lien, in addition to being a mechanic's and materialmen's lien, as provided by Arkansas Statutes (1947) Sections 51-601 to 51-631, is also a mechanic's and materialman's lien under and by virtue of the provisions of Arkansas Statutes (1947) Sections 51-701 to 51-714, inclusive. That said statutory lien is a prior, paramount and superior lien upon the property above described and the improvements located thereon, and that default has been made in the payment thereof.

Wherefore, this defendant, as Cross-complainant, prays that it do have and recover judgment against the defendant, Westmoreland Manganese Corporation, in the sum of Fifteen Thousand Seven Hundred and 13/100 Dollars ($15,700.13), together with interest thereon at the rate of six per cent (6%) per annum from June 2, 1953, until paid, and that such judgment be decreed a prior, paramount and superior lien upon the above described property and the improvements thereon, and if not paid within a time to be fixed by this Court that said property and improvements be sold, and that the proceeds of such sale be applied, first, to the payment of the aforesaid judgment, and that the balance be deposited in the registry of this Court pending the final orders of the Court as to the relative rights of the other parties to this action.

Cross-complaint further prays for its costs herein expended, and for any and all other relief to which it may appear to be entitled.

Bragg's Electric Construction Company

By Catlett & Henderson

By /s/ E. DeMatt Henderson

Attorneys for Defendant

727 Pyramid Life Building

Little Rock, Arkansas

SEPARATE ANSWER AND CROSS-COMPLAINT OF LATROBE CONSTRUCTION COMPANY

(Filed in U. S. District Court on March 3, 1954)

This defendant, Latrobe Construction Company, for its Separate Answer to the complaint of plaintiff in the above styled action, states:

1.

It admits the allegations of paragraph 1 of the complaint.

2.

It admits the allegations of paragraph 2 of the complaint.

3.

It admits the allegations of paragraph 3 of the complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have, the effect alleged by plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by defendant Westmoreland Manganese Corporation to plaintiff, and denies that there was any such existing indebtedness.

4.

It admits the allegation of paragraph 4 of the complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit C to its complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation and against which plaintiff now seeks to have its lien claim enforced. That plaintiff had the right and opportunity to have executed to it mortgages which were definite and specific as to the particular property to be mortgaged, but neglected and failed to do so. Denies that plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Man

ganese Corporation equal or superior to the statutory lien of this defendant.

5.

It admits the allegations of paragraph 5 of the complaint only as to the execution of the instrument designated as a "supplemental Mortgage" and referred to as Exhibit D to the complaint, but denies that same in fact is a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property, or sufficiently describe the greater portion of the personal property held by the defendant Westmoreland Manganese Corporation against which the plaintiff now seeks to have its lien claim enforced. Denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

6.

It admits the allegations of paragraph 6 of the complaint.

7.

It admits the allegations of paragraph 7 of the complaint.

8.

It admits only the execution of the paper referred to in paragraph 8 of the complaint as "Amendment No. 1 to Letter Order GS 00P(D)-1226", but denies that it had or was intended to have the effect alleged by the plaintiff, denies that such "Amendment to Letter Order", or any other correspondence between the plaintiff or any of its agencies and the defendant Westmoreland Manganese Corporation in any manner affected the rights of this defendant to its statutory lien and the superiority thereof.

9.

It admits this defendant's claim of lien as alleged in paragraph 9 of the complaint, but states that the lien claimed by this defendant, Latrobe Construction Company

In addition to being a mechanic's and or materialman's lien generally as provided by 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947 Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated. This defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

10.

That this defendant lacks information to either deny or admit the allegations of paragraph 10 of the complaint.

11.

That this defendant lacks information to either deny or admit the allegations of paragraph 11 of the complaint.

12.

That this defendant lacks information to either deny or admit the allegations of paragraph 12 of the complaint.

13.

That this defendant lacks information to either deny or admit the allegations of paragraph 13 of the complaint.

14.

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant Westmoreland Manganese Corporation and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph 14 of the complaint this defendant lacks information to either deny or admit.

15.

Further answering, this defendant Latrobe Construction Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, between September 22, 1952, and February 26, 1953, both inclusive,

sold and delivered material to and performed labor for defendant Westmoreland Manganese Corporation under a written contract dated October 13, 1952, as mentioned in this defendant's account of Materialman's Lien duly filed with the Clerk of the Circuit Court of Independence County, Arkansas, May 9, 1953, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51.701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated, thereby asserting and preserving its lien for $314,471.33 and interest against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's complaint and all improvements, machinery and equipment thereon. Said contract of October 13, 1952, between this defendant and defendant Westmoreland Manganese Corporation with addenda thereto having been duly filed for record with the Clerk & Recorder of Independence County, Arkansas, and certified copy thereof is filed herewith as Exhibit "B" hereto.

This defendant here asserts its said liens in the sum of $314,471.33 together with interest thereon at the rate of six per cent per annum from May 9, 1953, until paid, superior to the claim of lien against any properties of defendant Westmoreland Manganese Corporation by the plaintiff.

16.

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph 2 of plaintiff's complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to this defendant Westmoreland Manganese Corporation the sum of $630,751.33 which the plaintiff had by the terms of said

contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00 and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

17.

And further answering, this defendant states that the plaintiff by the terms of its Contract with the Defendant, Westmoreland Manganese Corporation, which contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said defendant, and is jointly liable to this defendant, Latrobe Construction Company, to the extent of its commitment to advance funds for the "development, equipments, and preparation of the above-named property (i.e., deposits owned by Westmoreland Manganese Corporation located near Cushman, Arkansas) for the production of manganese ore"; that the plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland Manganese Corporation on that basis and for that purpose and not on the basis of an interest bearing loan secured by a mortgage, as plaintiff now by its complaint attempts to make it appear.

This defendant states that the plaintiff exercised control over the construction program and the purchases and payment of material and supplies for putting the Westmoreland Manganese Corporation properties into production of manganese; that the Plaintiff under paragraph [illegible] of the original Contract of April 7, [illegible] Westmoreland Manganese Corporation had the

"right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation".

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein.* Such mortgages are to be in the form and of the substances prescribed or approved by the Government."

And this defendant states that the plaintiff failed in its duty to see that moneys advanced by it against mortgages to be produced were used to pay for material and supplies furnished by this defendant, and allowed such advances to be used for other purposes, and this defendant states that the plaintiff is estopped to assert a lien by virtue of its alleged mortgages being subsequent to the lien of the defendant.

18.

That plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of $100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

Wherefore, this defendant prays that its lien in the amount of $314,471.33 together with interest thereon at the rate of six per centum per annum from May 9, 1953, until paid be held to have attached as of date of delivery of said materials to the land and mineral titles to land and to the machinery, materials, supplies and specific improvements upon the lands and mineral titles to lands of Westmoreland Manganese Corporation set forth in plaintiff's alleged mortgages, in preference to any lien or claim of lien of the plaintiff.

19.

CROSS-COMPLAINT

This defendant, Latrobe Construction Company, as cross-complainant, for its cross-complaint herein alleges that the defendant Westmoreland Manganese Corporation is indebted to it in the sum of $314,471.33 together with interest thereon at the rate of six per centum per annum from May 9, 1953, until paid, and for which it is entitled to liens as hereinabove set forth. Certified copy of this defendant's account for [illegible] attached to and [illegible] and made a part hereof as Exhibit "A" to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant Westmoreland Manganese Corporation in the sum of $314,471.33 together with interest thereon at the rate of six per centum per annum from May 9, 1953, until paid, and prays that said judgment be declared to be a prior and paramount lien upon the following described property:

The Southwest Quarter of the Northwest Quarter, and the North Half of the Southwest Quarter of Section 31, Township 15 North, Range 6 West in Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

WASHER PLANT, and the machinery and equipment therein consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8 D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to the payment of this judgment, for its costs, and any and all other relief to which it may appear to be entitled.

LATIMORE CONSTRUCTION COMPANY

By W. D. Murphy

J. J. McCaleb

Its Attorneys

AMENDMENT TO COMPLAINT

(Filed in U. S. District Court on June 21, 1954)

Comes the United States of America by Osro Cobb, United States Attorney for the Eastern District of Arkansas, prior to the time of filing of a responsive pleading by the defendant, Westmoreland Manganese Corporation, and amends Paragraph VIII of its original Complaint filed herein on January 8, 1954, to read as follows:

VIII

Article 5(b) of the original Letter Contract GS-00P(D)-12263, executed on April 7, 1952, and heretofore referred to in Paragraph II of this Complaint, provides:

> Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

Pursuant to this provision of the said original Letter Contract, a meeting was held in April 1952 between the representatives of the plaintiff and the representatives of the defendant, Westmoreland Manganese Corporation, to establish record and accounting procedures acceptable to the plaintiff. The plaintiff's requirements as to procedure, which were agreed to by the said defendant, called upon Westmoreland Manganese Corporation, prior to any advance under the contract, to submit an original Cash Flow Sheet, showing the estimated cost of each major component of the contemplated construction work and also the amount estimated as being required for each component for each month of the anticipated construction, totaled to show the estimated cost of the entire project, which should not exceed the amount which the plaintiff had agreed to advance, to-wit, $3,807,250.00, and which should conform as nearly as possible to the detailed cost estimates submitted by the defendant, Westmoreland Manganese Corporation, during

negotiations prior to the execution of the original Letter Contract, it being the understanding of the parties that the said Westmoreland Manganese Corporation was committing itself to build the project for a total cost not to exceed the amounts to be advanced by the plaintiff. The original flow sheet of estimated costs was prepared on April 11, 1952. On its face, it showed that it was contemplated by the parties that the construction program would be completed by January 1, 1953, and that the operation of the washing plant should begin by that date. A counter-signature system was also established, which required the Dallas, Texas, Comptroller of the General Services Administration to sign checks drawn against advances, but the sole function of the Dallas Comptroller in this respect was to assure itself that each voucher and check was legitimately charged to one of the components shown on the flow sheet and that the total of such checks against any one component did not exceed the total amount authorized and estimated therefor. It was also agreed between the parties that each request for an advance subsequent to the original request was to be submitted on a cash flow sheet similar to the original Cash Flow Sheet mentioned above, but containing in addition thereto the following information:

a. Amount expended during previous period.

b. Total amount expended to end of previous period.

c. Unexpended balance at end of previous period.

d. Requirements for next succeeding period and for all other periods until the end of construction term.

e. Total requirements for each category or component.

f. Detailed explanation of overruns in any category.

g. Commitments as of date of request.

The amount to be advanced upon such a request was understood to be the amount indicated as being needed for the ensuing month, adjusted for errors, less the net unexpended balance, if any.

On May 2, 1952, the defendant, Westmoreland Manganese Corporation, requested an advance of $418,600.00 to cover payments for land purchases, and that amount was disbursed to the said defendant on May 6, 1952.

On May 22, 1952, Westmoreland Manganese Corporation requested an advance of $525,823.00 for construction and working capital. This amount was advanced on June 6, 1952.

On July 21, 1952, an advance of $702,920.00 was requested and, of this amount $687,325.00 was disbursed on August 6, 1952, and $12,627.00 of the remaining $15,595.00 was allowed and disbursed on August 20, 1952.

On August 28, 1952, an advance of $932,520.00 was requested, and this amount was disbursed on September 17, 1952.

As of September 17, 1952, a total of $2,576,895.00 had been disbursed as aforesaid.

All of the abovementioned requests showed the same estimated total cost for the project of $3,807,250.00 and conformed in detail to the original estimate, and the plaintiff, therefore, was without any indication that the project was not progressing according to the terms of the agreement between the parties.

On November 5, 1952, an advance of $364,294.00 was requested by Westmoreland Manganese Corporation. This written request indicated a cash balance of $72[illegible] and estimated expenditures in November, 1952, of $1,00[illegible] The Comptroller found that the request was worthless and did not contain the proper information nor conform to the procedure required for securing advances. The request was therefore refused. On December 4, 1952, agents of the plaintiff and defendant, Westmoreland Manganese Corporation conferred in an effort to straighten out the situation,

and the plaintiff sent detailed instructions to the defendant on how to proceed.

On January 12, 1953, an advance of $334,745.00 was requested by the defendant, Westmoreland Manganese Corporation, which request, with cash on hand, of $134,041.00 covered anticipated expenditures for January, 1953, of $478,786.00 for certain specified categories. This request also indicated a total cost for the project of $3,807,250.00 in accord with the original estimate. The requested amount was disbursed on February 11, 1953. As of that date, the total of the advances was $2,911,640.00.

On February 9, 1953, and on February 10, 1953, an inspection was made by the plaintiff of the facilities and books of the defendant, Westmoreland Manganese Corporation, which disclosed that charges to working capital had actually been expended for capital improvements, namely road construction, for which no funds had been previously authorized or requested. The use of these funds was a misapplication, constituting a breach of the agreement between the parties, and the seeking of such funds for such use on the representation that they were intended for use as working capital was also a breach of the said agreement between the parties.

The examination of the books of the Corporation also revealed to the plaintiff a probable overrun in the cost of construction and other capital acquisitions of about $468,000.00 which had never been reported by Westmoreland Manganese Corporation, and this failure to report said overrun was also a breach of the said agreement.

On February 28, 1953, a statement was submitted by Westmoreland Manganese Corporation, indicating a revised total estimated cost for the project of $4,344,850.00 —an admission by the said defendant Corporation that it was in default in its undertaking to construct the plant and facilities for a cost not to exceed $3,807,250.00.

The said original Letter Contract GS-OOP(D)-12263 provided in Paragraph 1 thereof as follows:

"You shall begin such production as soon as possible, and commencing not later than twelve (12) months from the date of your acceptance of this order. Such production shall be at an average rate of 2,000 long dry tons per month during the first four months of operation, and continue thereafter at an average rate of 47,250 long dry tons per year."

By April 2, 1953, it had been admitted by the defendant, Westmoreland Manganese Corporation, as indicated above, that it would cost over $500,000.00 more to build the plant and to acquire the other necessary capital facilities needed than it had originally determined necessary. Westmoreland Manganese Corporation was obligated under the original Letter Contract to be producing manganese at a rate of 2,000 long dry tons of ore per month by April 7, 1953, i.e. five days later. Impliedly it had undertaken to complete the plant facilities and to begin production at a much earlier date, and, in fact by December 31, 1953, as indicated on the original Flow Sheet prepared on April 11, 1952. In any event, it was impossible on April 2, 1953, for Westmoreland Manganese Corporation to finish its construction program by April 7, 1953, much less to be in production at the average daily rate indicated, and, therefore, Westmoreland Manganese Corporation was in default on April 2, 1953, under the terms of the original Letter Contract, and both the plaintiff and the defendant, Westmoreland Manganese Corporation, recognized that the said defendant was in default and that the plaintiff was contemplating the taking of action to protect its interests.

On April 2, 1953, the defendant, Westmoreland Manganese Corporation, was in default under the original Letter Contract, and further agreements made pursuant to the provisions thereof, in the following respects, among others:

a. Westmoreland Manganese Corporation had failed to complete the facilities and to commence production within the time provided in the contract.

b. The defendant, Westmoreland Manganese Corporation, failed to keep and maintain proper books and records.

c. The defendant, Westmoreland Manganese Corporation, failed to provide accurate and proper reports.

d. The defendant, Westmoreland Manganese Corporation, failed to provide satisfactory and competent management as required.

e. The defendant, Westmoreland Manganese Corporation, failed to present accurate and realistic cash requirements on monthly flow sheets.

f. The defendant, Westmoreland Manganese Corporation, expended funds and incurred obligations in an amount exceeding that contemplated under the contract and improperly classified expenditures and misapplied funds,

Throughout this period and more particularly during the period immediately prior to April 2, 1953, the defendant, Westmoreland Manganese Corporation, was represented and advised by legal counsel of its own choice. On April 1, 1953, at a meeting of the Board of Directors of Westmoreland Manganese Corporation, duly called, the following resolution was unanimously adopted:

"Resolved that E. P. Blough, Treasurer of the Westmoreland Manganese Corporation, be authorized and instructed to sign and execute, and W. H. Specht, Secretary of the Corporation, be authorized and instructed to attest on behalf of the Westmoreland Manganese Corporation, Amendment No. 1 to Letter Order No. GS-OOP(D)-12263 between the United States of America and Westmoreland Manganese Corporation."

Fully recognizing that it was in default under the original Letter Contract, and that it was useless to insist upon the sixty days notice provided for in the mortgage agreements for the reason that said defaults could not possibly be cured, and recognizing that they had already been given notice more than sixty days prior thereto, and also that it was in dire financial circumstances, and further realizing that, even if the plaintiff advanced all of the remaining

money in the original contract fund, it could not complete the plant and facilities as required by the contract and hoping to gain additional time in which to negotiate with the plaintiff or others in an effort to extricate itself from this situation, the defendant, Westmoreland Manganese Corporation, on the 2nd day of April, 1953, entered into and executed an agreement entitled "Amendment No. 1 to Letter Order No. GS-OOP(D)-12263", whereby the defendant, Westmoreland Manganese Corporation, agreed to place the facilities on a temporary standby basis and to preserve the facilities from the elements, theft, and damage, and the United States of America agreed to make further advances for this purpose. The said Amendment No. 1 also provided, among other things, that the United States of America would make further advances to enable Westmoreland Manganese Corporation to meet certain of its outstanding accrued obligations, principally those for accrued and payable wages and salaries. The introductory paragraphs of this Amendment No. 1 are as follows:

"Whereas, the parties hereto entered into Letter Agreement No. GS-OOP(D)-12263, dated April 7, 1952 (hereinafter referred to as the "Contract"), under the terms of which the Contractor covenanted to construct facilities (as defined in the aforesaid Contract), at or near Cushman, Arkansas, which would enable Contractor to produce and process manganese ore within a period of one year from the date of the Contract; and

"Whereas, the aforesaid facilities have not been completed and the production of manganese ore will not be commenced within the period provided in the Contract; and

"Whereas, the Contractor is without funds to complete the aforesaid facilities and has currently outstanding due and overdue financial obligations to employees, ex-employees, suppliers, contractors and general creditors, which obligations the Contractor is unable to meet.

"Now, therefore, in consideration of the mutual promises herein contained and other good and val-

uable consideration, the parties hereto agree as follows:"

That pursuant to the terms of said Amendment No. 1, and in reliance on the obligations therein mutually assumed, the plaintiff made the advances and otherwise performed the covenants as set out in said agreement, and, the defendant did accept the benefits of said contract and also raised and paid over the matching moneys as required by said contract for the purpose of paying past-due wages and salaries.

Said Amendment No. 1 further provides:

"3. Notwithstanding any provision in the Contract to the contrary, the Contractor hereby grants to the Government the unqualified right and privilege of terminating the Contract at any time in the future up to the commencement of production upon determination by the Government that termination of the Contract is in the best interest of the Government; the Contract shall take no legal action to prevent such termination of the Contract by the Government, and disclaims any and all recourse by reason of such termination by the Government.

"4. Under the terms of a mortgage instrument made by the Contractor to the Government on May 22, 1952, pursuant to the terms of the Contract, it is provided that the Contractor shall have sixty (60) days from notice to remedy the Contractor's failure or refusal to perform any covenant, agreement or condition in the Contract, note or mortgage as a condition precedent to foreclosure. Contractor hereby waives the sixty-day period granted by said mortgage within which to remedy the breach, and agrees that henceforth all moratorium provisions contained in said mortgage shall be without force and effect, and in the event of termination of the Contract as provided in paragraph 3 hereof, the Contractor shall, on demand of the Government, grant the Government immediate possession of the

facilities, with the right to use the facilities in place or offsite, either directly or by contract, and the Government may lease and dispose of such facilities, provided, however, that nothing herein contained shall prejudice or impair the right of the Contractor to an accounting. Contractor shall, at the request of the Government, execute, deliver and record a supplemental mortgage under the terms of which the aforesaid sixty-day moratorium provisions shall be deleted from the original recorded mortgage.

A copy of said Amendment No. 1 is hereto attached, marked Exhibit G and made a part hereof, the original being held subject to the inspection of the parties in interest and to the orders of this Court.

OSRO COBB
United States Attorney
By G. THOMAS EISELE
Assistant United States Attorney

SECOND AMENDMENT TO COMPLAINT

(Filed in U. S. District Court on October 27, 1954)

Comes the United States of America by Osro Cobb, United States Attorney for the Eastern District of Arkansas, prior to the time of the filing of an answer by the defendant, Westmoreland Manganese Corporation, but after having filed (on June 21, 1954) one amendment to its original Complaint, and now moves this Court for an order permitting it again to amend its Complaint in the following particulars:

1.

The following amendments should be made by interlineation or substitution, as follows:

(a) Page 2 of the Amendment to Complaint, heretofore filed in this action on June 21, 1954, should be stricken, and

the attached "Substituted Page 2 to First Amendment to Complaint" should be inserted in place thereof.

(b) On Page 3, the following changes by interlineation should be made:*

Line 20—"May 6, 1952" changed to "May 7, 1952";

Line 23—"June 6, 1952" changed to "June 9, 1952";

Line 24—"$702,920.00" changed to "$702,920.17";

Line 25—"$687,325.00" changed to "$687,325.57";

Line 25—"August 6" changed to "August 7";

Line 26—"$12,627.00" changed to "$12,627.20";

Line 26—"$15,595.00" changed to "$15,594.60";

Line 27—"August 20, 1952" changed to "August 22, 1952";

Line 28—"$932,520.00" changed to "$932,519.60";

Line 29—"September 17, 1952" changed to "September 19, 1952";

Line 30—"$2,576,895.00" changed to "$2,576,895.37";

(c) The paragraph beginning at the bottom of page 3 of the Amendment to Complaint heretofore filed on June 21, 1954, which starts as follows:

> "All of the above mentioned requests showed the same estimated total cost for the project ..."

should be amended to read as follows:

> "All of the above mentioned requests showed the same total amount estimated for the project ~~(including land acquisition cost, working capital~~ provision for a second slime pond, as well as the amount necessary for the acquisition and completion of the new facilities) of $3,807,250.00 and conformed in detail to the original estimate, and the plaintiff, therefore, was without any indication that

* Every typed line, or part thereof, is counted as a "line", whether single or double spaced.

the project was not progressing according to the terms of the agreement between the parties."

(d) The second full paragraph on Page 4 of the said Amendment to Complaint mentions an advance of "$334,745.00". This figure should be amended to read "$344,744.85". The second sentence of the said paragraph as found in the said Amendment to Complaint contains the words "total cost for the project". The word "cost should be stricken and the words "cash requirement" should be substituted therefor. The figure of "$2,911,640.00" found in the last sentence of said paragraph should be changed to read "$2,921,640.22".

(e) The second full paragraph on Page 5 of the Amendment to Complaint, which now begins as follows:

"On February 28, 1953 ..."

should be stricken and the following paragraph inserted in place thereof:

"On February 28, 1953, a statement was submitted by Westmoreland Manganese Corporation indicating a revised total estimated cash requirement for the project of $4,344,850."

(f) In the fourth line on page 6 of the Amendment to Complaint is found the date "December 31, 1953". This date should be "January 1, 1953".

2.

Paragraph XIII of the original Complaint should be stricken and the following paragraph XIII should be substituted therefor:

"XIII

"That pursuant to the Original Letter Contract, Amendment No. 1 thereto, and the Mortgage Note executed by the defendant, Westmoreland Manganese Corporation, the plaintiff advanced as of the date of this Complaint the principal sum of $3,000,381.03, against which sum certain credits, ag-

gregating $123,374.53, have been allowed the defendant, Westmoreland Manganese Corporation, on the dates and in the amounts as follows:

"April 13, 1953—$119,230.31 for cash withdrawal from the joint bank account of the plaintiff and defendant;

"May 19, 1953—$4,136.42 for work performed by the defendant, Westmoreland Manganese Corporation for Southwestern Engineering Company; and

"November 10, 1953—$7.80 for insurance premium adjustment;

"leaving a principal balance advanced by the plaintiff to the defendant, Westmoreland Manganese Corporation, as of the date of this Complaint, of Two Million Eight Hundred Seventy-Seven Thousand Six Dollars and Fifty Cents ($2,877,006.50) and interest has accrued thereon as of the date of this Complaint in the amount of One Hundred Fifty-Nine Thousand Six Hundred Thirty-Nine Dollars and Nineteen Cents ($159,639.19) and on which principal balance interest accumulates daily at the rate of Three Hundred Fifteen Dollars and Twenty-Eight and Eight Tenths Cents ($315.288). No payment of either said principal balance or interest on this indebtedness by the defendant, Westmoreland Manganese Corporation, has been made, and the total amount is now due and payable to the plaintiff."

3.

The prayer in the original Complaint should be amended to show the principal sum due of "$2,877,006.50" (instead of "$2,876,498.71") and interest in the sum of "$159,639.19" (instead of "$315.23").

4.

The plaintiff further desires to supplement its original Complaint by adding the following paragraphs:

"XI-A

"On or about July 21, 1954, the plaintiff, acting by and through John M. McGee, Acting Regional Director of the General Services Administration, notified the defendant, Westmoreland Manganese Corporation, of the said defendant's defaults in performance of its obligations under the Real Estate and Chattel Mortgage and Contract GS-OOP(D)-12263. This notice of default was given pursuant to the provisions concerning same found in the said Real Estate and Chattel Mortgage. In referring to the said defaults, the said notice incorporated the allegations contained in the Amendment to Complaint heretofore filed by the plaintiff in this action on June 21, 1954. The said notice letter concluded as follows:

"'On November 24, 1952, by letter to your Corporation from Mr. Johnston Russell of this Administration, you were given notice of several defaults under the contract and mortgage, and we do not hereby waive any right under that or any other notice of default heretofore given.

"'By the giving of this notice, we do not admit that such notice is necessary and we do not waive any rights which the government has or may have under Amendment No. 1 to Contract No. GS-OOP(D)-12263, executed on April 2, 1953.'

"As of the date of the filing of plaintiff's 'Second Amendment to Complaint', the default referred to in the notice letter remain and continue unremedied. Under the option contained in the Real Estate and Chattel Mortgage, plaintiff has declared and does declare the entire indebtedness due and payable. (See pages 16 and 17 of the Real Estate and Chattel Mortgage.)"

"XI-B

"Prior to the filing of the original Complaint herein on January 8, 1954, defendant failed to pay certain taxes due the United States of America as well as other taxes, and assessments, and failed to maintain insurance as required under the mortgage instruments. For such failure, 60 days notice of which is *not* required (see subparagraph e, page 16 of Real Estate and Chattel Mortgage), plaintiff mortgagor declared (pursuant to the option mentioned in the last paragraph), and does hereby declare, the entire indebtedness due and payable."

5.

The entire sentence on page 3 of the original Complaint (lines 20-26), commencing with the words:

"For the purpose of assisting Westmoreland Manganese Corporation in the installation ..."

should be stricken and the following sentence substituted therefor:

"For the purpose of assisting Westmoreland Manganese Corporation in the developing, equipping, preparation, and operation of its properties and facilities (including working capital, completion of land purchase, and the acquisition and installation of new facilities), the United States of America agreed to advance sums of money in a total amount not to exceed $3,807,250.00, said advances to bear interest at the rate of 4% per annum from the date of each advance and to be payable on or before January 1, 1960."

This motion is made for the purpose of correcting certain errors contained in previous pleadings and for the purpose of more accurately alleging the facts.

The plaintiff further moves the Court, in the event this motion is granted, to enter its order designating this motion as the "Second Amendment to Complaint".

OSRO COBB, United States Attorney
/s/ G. Thomas Eisele
By G. THOMAS EISELE
Assistant United States Attorney

SUBSTITUTED PAGE 2

original Cash Flow Sheet, showing the estimated cost of each major component of the contemplated construction work and also the amount estimated as being required for each component for each month of the anticipated construction, totaled to show the estimated cost of the acquisition and completion of the entire facilities, which should not exceed $2,788,650.00 (of which $155,000 was to be used for the construction of a second slime pond, if and when required) and showing the amount estimated as being required to pay off the balance owed on mining properties not to exceed $418,600.00 and the amount estimated for working capital requirements of the new facilities not to exceed in the aggregate $600,000.00. It was understood that this Cash Flow Sheet would conform as nearly as possible to the detailed cost estimates submitted by the defendant, Westmoreland Manganese Corporation, during negotiations prior to the execution of the original Letter Contract. The original flow sheet of estimated costs was prepared on April 11, 1952, by the defendant, Westmoreland Manganese Corporation and on its face, it indicated that the construction program would be completed by January 1, 1953, and that the operation of the washing plant should begin by that date. A countersignature system was also established, which required the Dallas, Texas, Comptroller of the General Services Administration to sign checks drawn against advances, but the sole function of the Dallas Comptroller in this respect was to assure itself that each voucher and check was legitimately charged to one of the components shown on the flow sheet and that the total of such checks against any one component did not exceed the total amount authorized and estimated therefor. It was also agreed between the parties that each request for an advance subsequent to

GOVERNMENT'S CONSOLIDATED REPLY TO CREDITOR-DEFENDANTS' ANSWERS

(Filed in U. S. District Court on January 21, 1955)

I

Reply to Answer of
Latrobe Construction Company

A.

Paragraphs 1 through 8 of the defendant Latrobe's Answer do not require a reply by the plaintiff.

B.

The plaintiff denies that the defendant Latrobe has any "miner's lien" under Sections 51-701 to 51-714 of Arkansas Statutes 1947, Annotated, as alleged in Paragraph 9 of the said defendant's Answer, which is in any way superior or prior to the lien created by the plaintiff's prior mortgage.

C.

Paragraphs 10, 11, 12, 13 and 14 inclusive of defendant Latrobe's Answer do not require a reply by the plaintiff.

D.

The plaintiff, for lack of information sufficient to form a belief, denies the allegations contained in Paragraph 15 of the defendant Latrobe's Answer, for the purpose of requiring strict proof of same.

E.

The plaintiff denies the allegations contained in Paragraph 16 of the defendant Latrobe's Answer and specifically denies that it in any way breached its contract with Westmoreland Manganese Corporation.

F.

The plaintiff denies the allegations of Paragraph 17 of Latrobe's Answer insofar as it alleges that the plaintiff

was and is engaged in a joint enterprise with the defendant Westmoreland Manganese Corporation. The plaintiff admits that it was vitally interested in the production and stockpiling of manganese when the plaintiff entered into the original letter contract dated April 7, 1952, with Westmoreland Manganese Corporation but states that its interest in the said contract was that of a prospective customer of the said defendant Westmoreland Manganese Corporation, and that the moneys were advanced by the Government to assist Westmoreland Manganese Corporation in getting into production of manganese ore. The plaintiff admits that the contract dated April 17, 1952, contains the provisions quoted in said Paragraph 17 of Latrobe's Answer. The plaintiff denies the other allegations contained in said Paragraph 17.

G.

The plaintiff denies the allegations contained im Paragraph 18 of the defendant Latrobe's Answer and particularly denies that the said defendant had any right to rely on or look to the plaintiff for the payment of any obligations incurred by the defendant Westmoreland Manganese Corporation to it. The plaintiff further asserts that the said defendant Latrobe is not entitled to the relief sought in its prayer contained in said Paragraph 18.

II

Reply to Answer of
Arkansas Foundry Company

The plaintiff incorporates the answers contained in Section I above as its reply to Paragraphs 1 through 18 of the defendant Arkansas Foundry Company's Answer.

III

Reply to Answer of Ira Sherrill

The plaintiff incorporates the answers contained in Section I above as its answer to Paragraphs 1 through 18 of the defendant Ira Sherrill's Answer.

IV

Reply to Answer to Choctaw, Inc.

The plaintiff incorporates the answers contained in Section I above as its answer to Paragraphs 1 through 18 of the defendant Choctaw's Answer.

V

Reply to Answer of Jeffery Lumber Company

The plaintiff incorporates the answers contained in Section I above as its answer to Paragraphs 1 through 18 of the defendant Jeffery Lumber Company's Answer.

VI

Reply to Answer of Padgett Lumber Company

The plaintiff incorporates the answers contained in Section I above as its answer to Paragraphs 1 through 18 of the defendant Padgett Lumber Company's Answer.

VII

Reply to Answer of
General Steel Products Company

The plaintiff incorporates the answers contained in Section I above as its answer to Paragraphs 1 through 18 of the defendant General Steel Products Company's Answer.

VIII

Reply to Answer of
Mill and Mine Supply Company

The plaintiff incorporates the answers contained in Section I above as its answer to Paragraphs 1 through 18 of the defendant Mill and Mine Supply Company's Answer.

IX

Reply to Answer of Crow-Burlingame

The plaintiff incorporates the answers contained in Section I above as its answer to paragraphs 1 through 18 of the defendant Crow-Burlingame's Answer.

X

Reply to Answer of Bragg's Electric Construction Company

A.

Paragraphs 1 through 14 of the defendant Bragg's Answer do not require a reply by the plaintiff.

B.

The plaintiff denies the allegations contained in Paragraph XV of the defendant Bragg's Answer.

C.

The plaintiff denies the allegations contained in Paragraph XVI of the defendant's Answer insofar as they allege that the defendant Bragg is in any way a third party beneficiary of the contract between the United States of America and Westmoreland Manganese Corporation. For lack of information sufficient to form a belief, the plaintiff denies that a written request for an advance sufficient to pay the indebtedness owing the defendant Bragg by Westmoreland Manganese Corporation was made to the plaintiff. The plaintiff denies the remainder of Paragraph XVI of the defendant Bragg's Answer.

D.

The plaintiff denies the allegations contained in Paragraph XVII of the defendant Bragg's Answer and further denies that the said defendant is entitled to the relief prayed for in said Paragraph of its Answer.

(Following omitted parts of pleading inapplicable)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed in U. S. District Court January 27, 1954)

This cause comes on for hearing upon the plaintiff's application for the appointment of a Receiver Pendente Lite to take charge of the properties of the defendant, Westmoreland Manganese Corporation, all parties to the action as named in the original Complaint filed herein being represented personally or by counsel save and except only the State of Arkansas, which application is submitted to the Court upon affidavits and oral testimony, and the Court being well and fully advised doth make the following Findings of Fact and doth state the following Conclusions of Law, to-wit:

Findings of Fact:

1. That by two separate instruments, both dated May 22, 1952, the defendant Westmoreland Manganese Corporation mortgaged, or purported to mortgage, all of the property that it then owned, as well as all of the property that it might thereafter acquire, to the United States of America, as security for the payment of a certain promissory note dated May 22, 1952, and for the performance of a certain Letter Contract No. G OP(D)-12263 and any amendment thereto that might be entered into between the United States of America and the said defendant Corporation. Under the provisions of the above instruments, the plaintiff advanced to the defendant a principal sum in excess of $2,800,000.00.

2. That the defendant Westmoreland Manganese Corporation has suffered and permitted the following default judgments to be taken against it:

A. Judgment in favor of Koppers, Inc. in the sum of Four Hundred Thirty-Two Dollars and Twenty-Two Cents ($432.22), plus costs;

B. Judgment in favor of Continental Gin Company in the sum of Forty Thousand Seven Hundred Twenty-Seven Dollars and Seventy-Six Cents ($40,727.76), plus costs:

C. Judgment in favor of Transall, Inc. in the sum of Four Thousand Four Hundred Ninety-Nine Dollars and Six Cents ($4,499.06), plus costs;

D. Judgment in favor of Trans World Airlines, Inc. in the sum of Seven Hundred Thirty-Eight Dollars and Eighty-One Cents ($738.81), plus costs;

E. Judgment in favor of Westinghouse Supply Company in the sum of One Thousand Seven Hundred Eighty-Four Dollars and Three Cents ($1,784.03), plus costs;

F. Judgment in favor of Gardner-Denver Corporation in the sum of Four Hundred Fifty-Eight Dollars and No Cents ($458.00), plus costs; and

G. Judgment in favor of Central Scientific Company in the sum of One Hundred Seventy-Eight Dollars and Fifty-One Cents ($178.51), plus costs.

3. That the following mechanics', laborers' and or materialmen's liens have been filed, claiming certain interests in certain properties mortgaged, or purported to be mortgaged, to the United States of America:

A. Materialmen's lien in favor of Ira C. Sherrill in the sum of Three Hundred Sixty-Two Dollars and Fifty Cents ($362.50);

B. Materialmen's lien in favor of Padgett Lumber Company in the sum of Three Thousand Eight Hundred Sixty-Six Dollars and Twenty Cents ($3,866.20);

C. Materialmen's lien in favor of Mill and Mine Supply Company in the sum of Eight Thousand Three Hundred Twelve Dollars and Sixty-Nine Cents ($8,312.69);

D. Materialmen's lien in favor of Arkansas Foundry Company in the sum of Forty-Nine Thousand Two Hundred Sixty-Seven Dollars and Ninety-Six Cents ($49,267.96);

E. Materialmen's lien in favor of Jeffery Lumber Company in the sum of Two Thousand One Hundred Fifty-Seven Dollars and Fifty-Five Cents ($2,157.55);

F. Labor and materialmen's lien in favor of Latrobe Construction Company in the sum of Three Hundred Fourteen Thousand Four Hundred Seventy-One Dollars and Thirty-Three Cents ($314,471.33);

G. Materialmen's lien in favor of General Steel Products Company in the sum of Fifteen Thousand Nine Hundred Twenty-Five Dollars and Sixty-Two Cents ($15,925.62);

H. Materialmen's lien in favor of Crow-Burlingame Company in the sum of Four Thousand Three Hundred Sixty-Six Dollars and Twelve Cents ($4,366.12);

I. Labor and materialmen's lien in favor of Bragg's Electric Construction Company in the sum of Fifteen Thousand Seven Hundred Dollars and No Cents ($15,700.00);

J. Materialmen's lien in favor of Choctaw, Inc. in the sum of Three Thousand Eighty-Six Dollars and Twenty-Nine Cents ($3,086.29);

4. That a lien in favor of the United States of America (Internal Revenue) in the sum of Six Thousand Two Hundred Twenty-Eight Dollars and Forty-Two Cents ($6,228.42) has been filed in the Mechanics', Laborers' and Materialmen's Record Book B at Page W in the Circuit Clerk's office of Independence County, Arkansas.

5. That the defendant Westmoreland Manganese Corporation, by virtue of its inadequate cash and liquid assets position, cannot finance or pay for the custodial and maintenance services required for the protection and preservation of the property.

6. That the defendant Westmoreland Manganese Corporation is insolvent.

7. That much of the personal property and equipment belonging to the defendant Westmoreland Manganese Corporation, and mortgaged, or purported to be mortgaged, to the United States of America, has suffered extensive deterioration in the last few months due to the failure and inability of the said defendant Corporation to properly protect and maintain said property and equipment.

8. That the personal property and equipment of the defendant Westmoreland Manganese Corporation, as well as certain improvements and fixtures, are, in the absence of proper custodial protection, in danger of being lost, removed, and injured.

9. That the assets and properties mortgaged, or purported to be mortgaged, to the United States of America, are inadequate to discharge the debt owing, or purported to be owing, to the United States of America.

10. That the defendant Westmoreland Mangaese Corporation has allowed certain insurance policies, which are necessary for the protection of the security mortgaged, or purported to be mortgaged, to the United States, to lapse or to be cancelled by failure of the said defendant Corporation to pay the premiums due on said policies, and, further, that certain policies are about to be cancelled, as follows, to-wit:

A. Building-Builders' Risk, Fire and Extended Coverage policies in several different insurance companies in the amount of Five Hundred Thirty-Five Thousand Dollars and No Cents ($535,000.00), carried with Collins and Company, 206 Louisiana Street, Little Rock, Arkansas, have been cancelled.

B. Policy No. A 484796 in the Fireman's Fund Insurance Company in the amount of Seventy Thousand Dollars and No Cents ($70,000.00) on electrical equipment, carried with Collins and Company, 206 Louisiana Street, Little Rock, Arkansas, has been cancelled.

C. Policy No. 2654 in the Commercial Union Company in the sum of Ten Thousand Dollars and No Cents ($10,000.00) for fire and extended coverage, carried with Golden-Lindsey, Batesville, Arkansas, has been cancelled.

D. Policy No. 4D-596 with the Providence-Washington Company for fire and extended coverage in the amount of Two Hundred Eighty-Seven Thousand Two Hundred Thirty-Five Dollars and No Cents ($287,235.00), carried with Golden-Lindsey, Batesville, Arkansas, has been cancelled.

E. Policy No. 4D-594 in the Providence-Washington Company and Policy No. 2656 in the Commercial Union Company, for fire and extended coverage in the respective amounts of Twenty-Five Thousand Dollars and No Cents ($25,000.00) and Ten Thousand Dollars and No Cents ($10,000.00) have been extended under binders until the 29th day of January, 1954;

11. That the defendant Westmoreland Manganese Corporation has been at all times relevant to this action, up to and including the time of the hearing on this Motion, in possession of the properties mortgaged, or purported to be mortgaged, to the United States of America.

12. That service of process has been had upon the defendant Westmoreland Manganese Corporation, and that notice of this hearing was served upon the defendant Westmoreland Manganese Corporation on the 13th day of January, 1954, and notice of this hearing was also served upon the following named defendants, at the times indicated:

Name of Defendant	Date of Service of Notice
a. M. F. Highsmith	1-13-54
b. E. B. Blough	1-15-54
c. W. H. Specht	1-13-54
d. State of Arkansas	1-12-54
e. Transall, Inc.	1-13-54

f. Westinghouse Electric Supply Co. 1-12-54
g. Koppers Company, Inc. 1-13-54
h. Trans World Airlines, Inc. 1-13-54
i. Continental Gin Company 1-13-54
j. Gardner Denver Corporation .....
k. Ira C. Sherrill 1-14-54
l. Padgett Lumber Company 1-14-54
m. Mill and Mine Supply Company 1-12-54
n. Arkansas Foundry Company 1-12-54
o. Jeffery Lumber Company 1-14-54
p. Latrobe Construction Company 1-12-54
q. General Steel Products Company .....
r. Crow-Burlingame Company 1-12-54
s. Bragg's Electric Construction Company 1-12-54
t. Choctaw, Inc. .....
u. Carnegie Institute of Technology 1-13-54
v. Central Scientific Company 1-15-54

13. That the properties mortgaged, or purported to be mortgaged, to the United States of America are located principally in the Northern Division of the Eastern District of Arkansas.

14. The appointment of a Receiver is necessary to preserve and protect the property and preserve the status of the subject matter, pending a determination of this cause on its merits.

Conclusions of Law:

1. That this Court has jurisdiction of the plaintiff and of the defendant Westmoreland Manganese Corporation, and also of the subject matter of this action.

2. That the plaintiff, United States of America, as the mortgagee of certain or all of the properties of the defendant, Westmoreland Manganese Corporation, is a proper party to this action, and has standing to petition this Court for the appointment of a Receiver in this action.

3. That the property mortgaged, or purported to be mortgaged, to the plaintiff United States of America is in "danger of being lost, removed or materially injured"

within the meaning of that phrase as used in Sections 36-112 and 36-113 of the Arkansas Statutes of 1947, Annotated.

4. That this Court has authority under the statutes of the State of Arkansas, and independently thereof, by virtue of its inherent powers as a court of equity, to order the appointment of a Receiver in this cause, pending the determination of the issues on the merits.

5. That the plaintiff United States of America has made a *prima facie* showing that all of the assets and properties of defendant, Westmoreland Manganese Corporation, whether owned by the said defendant corporation at the time of the execution of the mortgage instruments or acquired by the said defendant corporation subsequent to the time of the execution of said mortgages, are mortgaged to the United States of America and stand as security for the payment of the note and the performance of certain contracts as alleged in the Complaint filed in this cause.

6. That the plaintiff will suffer irreparable damage if a Receiver is not appointed, and that the application of the plaintiff should be granted.

7. That plaintiff has no adequate remedy at law.

Dated this 27th day of January, 1954.

/s/ HARRY J. LEMLEY
United States District Judge

ORDER

(Filed in U. S. District Court January 27, 1954)

The Motion of the United States of America for the appointment of a Receiver Pendente Lite coming on for a hearing, all parties to the action as named in the original Complaint filed herein being represented personally or by counsel save and except only the State of Arkansas, and being presented to the Court upon the verified Complaint filed herein, the record, the affidavits of Albert H. Greene, James V. O'Dwyer, Robert J. Lippolt, R. B. Chapman, Mrs.

Prior Evans, David Saftlas, John Collins, and Peyton Golden, and upon the testimony *ore tenus* of Harry E. Meek, and upon certain documents introduced into evidence, to-wit: Letter Order No. GS-OOP(D)-12263, Amendment No. 1 to Letter Order No. GS-OOP(D)-12263, a certain "Mortgage Note", a certain "Real Estate and Chattel Mortgage", and a certain "Supplemental Mortgage"; together with other evidence, and the Court being well and sufficiently advised as to all matters of fact and law, and having filed herein its Findings of Fact and Conclusions of Law.

It is ordered, adjudged, and decreed that Honorable E. L. McHaney, Jr., Little Rock, Ark., be and he is hereby appointed Receiver Pendente Lite herein, and he is hereby directed forthwith to make the oath prescribed by law and file herein his bond in the amount of $50,000.00, conditioned as prescribed by law, which bond shall be approved by Grady Miller, Clerk of this Court.

It is further ordered, adjudged and decreed that said Receiver, after making the oath and filing his bond as hereinabove prescribed, and after the same shall have been approved as aforesaid, shall forthwith take possession of the properties, real, personal and mixed, described in the Complaint, and shall also take possession of all property, whether real, personal or mixed, including but not limited to all lands, tenements, goods, chattels, funds, assets, moneys, credits, choses in action, rights and interests of every kind, name, and nature, either in law or equity, or any part thereof, situated or located in the State of Arkansas, and acquired by the defendant Westmoreland Manganese Corporation subsequent to the execution of the Real Estate and Chattel Mortgages and Supplemental Mortgage referred to in the Complaint, and all persons or associations presently in possession of any of said properties are hereby ordered to deliver same into the hands of said Receiver.

It is further adjudged, ordered, and decreed that the Receiver shall, as soon as reasonably possible, carefully, accurately, and in detail, inventory all of said properties, indicate the status of all insurance on said properties, and

determine the custodial and maintenance requirements needed to protect and preserve the said properties of the defendant Westmoreland Manganese Corporation.

It is further ordered that the said inventory be filed with this Court and that copies thereof be made available to all of the parties to this action; that said inventory contain a full and complete description of each and every item of property, or any interest in property, belonging to the said defendant Westmoreland Manganese Corporation, indicating the date and terms of its purchase or acquisition and the name of the vendor or transferor thereof, and how much has been paid thereon, if any, and the balance owed thereon, if any, and whether or not suit has been brought for such balance as may be owed, and whether Judgment has been rendered therefor (together with the name of the Court and the date of the Judgment), and whether or not any mechanics' and or materialmen's liens have been filed therefor (together with the date of filing and the place of filing), and all other information which the said Receiver in his judgment believes will be pertinent to the issues in this action or of aid to this Court, or the parties hereto.

It is further ordered that the said Receiver prepare and file in this court, as soon as reasonably possible, a detailed list of all insurance now carried upon the properties of the defendant Westmoreland Manganese Corporation, or on any of the said properties, and, particularly, indicate all fire and extended coverage insurance which presently exists on the said properties; further, the said Receiver is directed, if he finds that the procurement of other or additional insurance is necessary for the proper protection of the said properties, or any part thereof, to procure same and report his actions to this Court.

It is further ordered that the said Receiver determine as soon as reasonably possible the maintenance and custodial requirements which may be needed to protect, preserve, and or maintain the properties in his possession and that the said Receiver report his conclusions in this regard to this Court.

It is further ordered that the said Receiver report any conditions or circumstances which he may discover which might adversely affect the assets and properties of the said Westmoreland Manganese Corporation to the detriment of any mortgage or lienholder who might possibly have an interest in said properties, or to the detriment of any other creditors of the said defendant Westmoreland Manganese Corporation.

It is further ordered that the Receiver ascertain if the possession of any property, acquired by the defendant Westmoreland Manganese Corporation subsequent to the execution of the Real Estate and Chattel Mortgage and the Supplemental Mortgage referred to in the Complaint, has been withheld from said defendant, or if delivery of any of said properties to said defendant has not been accomplished, or if any of said properties have been removed from the State of Arkansas, and if it is so found, the Receiver shall make a report thereof to this Court.

It is further ordered that the said Receiver file with this Court, within a reasonable time, a detailed estimate of the ordinary costs and expenses of the Receivership and also an itemized list of any extraordinary or non-recurring expenses which the said Receiver deems necessary to protect or preserve the property entrusted to him.

Said defendant Westmoreland Manganese Corporation is hereby ordered and directed to make available to said Receiver such of its books and records as said Receiver, in his judgment, shall deem necessary or desirable in the carrying out of the orders and instructions herein given to him.

It is further ordered that the Receiver be, and he is hereby, authorized and instructed to employ such persons and to obtain such materials and supplies as may be necessary to the proper fulfillment of his duties herein and that said Receiver make such reports to this Court as the said Court may from time to time direct.

This the 27th day of January, 1954.

/s/ HARRY J. LEMLEY
United States District Judge

Memorandum Opinion Relative to Priority of Creditor's Claims

(Filed in U. S. District Court on September, 1955)

This cause is now before the Court for a determination of the relative priorities of the claim of the Government and those of the other creditors of Westmoreland Manganese Corporation, principal defendant herein, to the property of said defendant. The controversy between the Government and the other creditors of Westmoreland (hereinafter at times referred to simply as "the creditors") relative to priority has been submitted upon the pleadings and exhibits thereto, certain stipulations of counsel, oral testimony, documentary evidence and written briefs. This memorandum, which deals with said controversy, contains our ultimate findings of fact and conclusions of law with respect thereto; and all requests for findings of fact and conclusions of law are denied, except to the extent that they may be incorporated herein.* The Government contends that the liens of its real estate and chattel mortgage and the supplement thereto, both executed on May 22, 1952, are superior to the claims of other creditors; the latter take the position that for various reasons, presently to be stated, their claims are superior to that of the Government.

The creditors, other than the Government, holding claims of over Three Hundred Seventy Thousand Dollars ($370,000), consist of suppliers of services and materials to Westmoreland in connection with the construction of the washing and concentrating plant and related improvements contemplated by the original contract between Westmoreland and the Government, dated April 7, 1952; there is no dispute as to the correctness of any of the claims, and the amounts thereof are set forth in the several stipulations

* In a memorandum filed on July 31, 1955, we held that the Government was entitled to judgment against Westmoreland for its principal claim and to foreclosure of its real estate and chattel mortgage and supplement thereto. At that time we did not undertake to pass upon the controversy between the Government and the other creditors, and stated in said memorandum that if it should become necessary to pass upon the issues involved in that controversy, they would be made the subject of a separate memorandum.

that have been filed herein. As far as the nature of their claims is concerned, the creditors fall into three groups, namely: those who claim liens under the Arkansas statutes creating "mechanics' and materialmen's liens" and "miners' liens";* those who do not claim the benefits of the statutes just mentioned, but who hold judgments for various amounts against Westmoreland;** and, finally, those who neither claim liens nor have judgments, and who are simply unsecured creditors. Since neither the Government nor Westmoreland disputes the validity or amounts of the claims in question, it goes without saying that both the lien claimants and the unsecured creditors are entitled in this proceeding to judgment against Westmoreland for their respective claims.

In support of their position that the claims of the Government are inferior to their own, all of the creditors contend that the Government's mortgage and the supplement thereto are invalid as to them, except with respect to the land purchased by Westmoreland and the improvements existing thereon at the time of the execution of said mortgages; that the relationship between Westmoreland and the Government was not the conventional mortgagor-mortgagee relationship, and that actually Westmoreland and the Government were joint venturers; that they were "third-party beneficiaries" under the contract

---

* The "Mechanics' and Materialmen's Lien Statute" is Act 146 of 1895, as amended, now codified as Ark. Stats., Sections 51-601 et seq. The "Miners' Lien Statute" is Act 615 of 1923, now codified as Ark. Stats., Sections 51-701 et seq.

** All of the judgments, except one, were rendered by the Circuit Court of Independence County, Arkansas; the exception is a small judgment rendered by the Municipal Court of the City of Batesville, Arkansas, which has been docketed, as prescribed by law, with the Circuit Clerk of Independence County.

between the Government and Westmoreland;* and, further, that by reason of certain alleged equitable considerations the Government's claim to priority should be denied.

In addition to the foregoing contentions, which are common to all of the creditors, the lien claimants assert priority under the Arkansas statutes that have been mentioned. The judgment creditors do not claim to have any liens on the lands of Westmoreland or on the improvements thereon which are superior to those of the Government or of the lien claimants; nor do they assert any claim to priority with respect to personal property of Westmoreland which is covered, or alleged to be covered, by mechanics', materialmen's or miners' liens. They do contend, however, with respect to certain automotive equipment purchased by Westmoreland that there was no compliance with Section 60 of Act 142 of 1949, (Ark. Stats., Section 75-160), hereinafter discussed, and that for that reason the Government's mortgages, even if otherwise valid, are invalid as to such equipment as far as creditors acquiring a lien by levy of execution are concerned, and that the Court should, in the exercise of its discretion, now permit them to have execution issued out of the State Court and levied upon such equipment, notwithstanding the existing receivership, so as to give them the benefit of the statute last mentioned.

The Government, for its part, denies the validity of all of the contentions of the creditors above outlined, and, as indicated, takes the position that its mortgage liens entitle it to priority as against all of the other creditors.

Taking up first the question of the validity of the Government's mortgages it is not contended that said mortgages were not properly executed, acknowledged and recorded, and apparently the creditors do not contend that

* We do not understand that the creditors carry their joint venture and third party beneficiary arguments so far as to claim that the Government is directly liable to them for materials and services furnished to Westmoreland; but they do contend that by reason of the alleged relationship between the parties the Government's claim should not be accorded priority over theirs.

said mortgages are invalid as to them as far as the land itself and the improvements existing thereon at the time the instruments were executed are concerned. They do contend, however, with respect to the improvements subsequently placed upon the land, and with respect to the personal property subsequently acquired by Westmoreland, that the descriptions in said mortgages are, as to third persons, void for indefiniteness, and, further, that said descriptions are "ambulatory". We do not agree.

It is a well settled principle of Arkansas law that a mortgage will not be held void for uncertainty even as to third persons, where by any reasonable construction it can be sustained; and where the description used furnishes a key whereby a person, aided by extrinsic evidence, can ascertain what property is covered, such description is sufficient. *Johnson* v. *Grissard*, 51 Ark. 410; *Snyder* v. *Bridewell*, 167 Ark. 8; and *American Investment Co.* v. *Gleason*, 181 Ark. 739. Furthermore, a description in a chattel mortgage is sufficient if a disinterested person, aided by inquiry suggested by the instrument, can identify the property intended to be covered. *Gurley* v. *Davis*, 39 Ark. 394; *Beckler* v. *Snerly*, 169 Ark. 317; *Blankenship* v. *Modglin*, 177 Ark. 388; *Neece* v. *Guerin*, 210 Ark. 954.

In *Johnson* v. *Grissard*, *supra*, a mortgage was upheld as against a third person where the only description of the property was "all my crops of corn, cotton or other produce that I may raise, or in which I may have in any manner an interest for the year 1884, in Faulkner County, Arkansas". The Court said that the description was not so indefinite and uncertain that it could not be made certain by extrinsic evidence; that the record of the mortgage was constructive notice, and that all persons buying any cotton from the mortgagor in Faulkner County were bound to inquire whether it was covered by the mortgage to Grissard. In *Snyder* v. *Bridewell*, *supra*, a mortgage was held good as to third parties where the description was simply "all property owned by the Nashville Lumber Co., or afterwards owned by the Nashville Lumber Co., or afterwards acquired by it in Howard ... (county, Arkansas)". The Court stated that the deed furnished a key

whereby the land might be identified and was sufficient. In *American Investment Co.* v. *Gleason, supra*, the Court stated that "... it is settled in this State that a deed or mortgage cannot be declared void for uncertainty if it is possible, by any reasonable rule of construction, to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed. In short, the office of the description in a deed or mortgage is not to identify the land, but to furnish the means of identification" (181 Ark. at 743).

In *Blankenship* v. *Modglin, supra*, the chattel mortgage in question described the mortgaged property as being, "All corn and cotton to be grown by (mortgagor) on the farm belonging to Earl Keich". That description was held sufficient against third parties although it appeared that Keich owned several farms; the Court pointed out that any disinterested person by reading over the mortgage and by making inquiry could have discovered that the mortgagor lived on one of Keich's farms and was making a crop of cotton and corn on it; it was said: "This court has laid down the rule that a mortgage of personal property is sufficient as to description if it be such that a disinterested person, aided only by such inquiry as the instrument itself suggests, is able to identify the property" (177 Ark. at 390). In *Neece* v. *Guerin, supra*, the Court cited with approval the decision of the Supreme Court of Oklahoma in *Hillery, et al* v. *Waurika Nat. Bank*, 100 Okla. 34, 226 Pac. 1051, wherein it was said, among other things, "...'As against third persons the description in the mortgage must point out its subject-matter so that such persons may identify the chattels covered, but it is not essential that the description be so specific that the property may be identified by it alone, if such description suggest inquiries or means of identification which, if pursued, will disclose the property conveyed'.... 11 C. J. 457" (210 Ark. at 958).

The description of property in the original mortgage before us consists of six sections, alphabetically designated A-F, both inclusive; in sections A through D the land and mineral rights here involved are definitely and specifically

described; Section E consists of two numbered paragraphs, the first of which specifically describes certain personal property owned at the time by Westmoreland, and the second of which covers, "Furniture, fixtures, machinery and equipment and all other personal property hereafter acquired by Mortgagor, together with all and singular the parts of and accessories to all said property whether now belonging thereto or hereafter added thereto by way of renewal, replacement or otherwise." Section F covers, "Any and all property, real, personal or mixed or rights to property hereafter acquired by Mortgagor, including the special bank account or accounts established by Mortgagor pursuant to the agreement of April 7, 1952, between Mortgagee and Mortgagor and any amendment thereto."

The supplemental mortgage recites that it was executed as a supplement to the original mortgage and that no rights under the original mortgage were waived by the mortgagee; Section I of said supplemental mortgage consists of a preamble and several paragraphs, alphabetically designated A-G, both inclusive. In the preamble it is recited that for the purpose of making more explicit the description of certain properties encumbered by the original mortgage the mortgagor acknowledged that said original mortgage was intended to and did cover, and that the supplemental mortgage also covered the property referred to in the succeeding paragraphs of the Section. Paragraph A specifically refers to the washing and concentrating plant then in existence and owned by Westmoreland, located about seven miles from the town of Cushman in Independence County, Arkansas, and Paragraph B specifically refers to the new washing and concentrating plant proposed to be built by Westmoreland at or near the site of the original plant; said paragraphs not only refer to the plants but also to "all buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, sidings, switch tracks and all other machinery equipment and personal property (including office equipment and automotive equipment) now or at any time hereafter comprising said plant, or used by Mortgagor in connection with the operation of said plant, or held or acquired by it for possible use in such respect".

Paragraph C purports to cover, "All other machinery, equipment and personal property (whether similar or dissimilar to any of the foregoing), wherever located, now owned by Mortgagor or at any time hereafter acquired by it."

As indicated, the original mortgage specifically described the lands owned by Westmoreland on May 22, 1952;* and we are satisfied that Paragraphs A and B of Section I of the supplemental mortgage, when read in the light of the principles laid down in the cases heretofore cited, are sufficiently definite in their descriptions of the existing plant and the new plant, and of the "buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, slime pond facilities, sidings, switch tracks and all other machinery, equipment and personal property" owned or to be acquired for use in connection therewith, to be binding upon third parties such as the creditors here. The creditors were on notice as to the existence of both the original and the supplemental mortgage, and a reading of those instruments by any disinterested person would have revealed that the Government was taking a mortgage on all land that Westmoreland owned in Independence and Izard Counties, Arkansas, on the plant that was then in existence, and on the one that was to be built, including all of the items of property that Westmoreland then owned or might thereafter acquire for use in connection with said plants and in connection with its contemplated mining operations. With this knowledge any reasonable inquiry would have revealed what property of Westmoreland was covered by the mortgages at any particular time; naturally, it was impossible for the parties at the time to describe in detail all of the particular items of property which might be acquired in the future. It should be kept in mind that we are not here concerned with any property of Westmoreland located anywhere except Independence and Izard Counties, Arkansas, nor are we concerned with any property acquired by Westmoreland

* There is no evidence that Westmoreland has ever acquired any lands other than those described in the original mortgage, so we are not here concerned with any after acquired lands.

for uses other than the construction of the plant and the mining and treating of manganese ore.

Counsel for the creditors have not cited us to any case which would indicate that the descriptions contained in Paragraphs A and B of Section I of the supplemental mortgage are void as to third parties for indefiniteness. If the Government were required to rely solely upon Section F of the original mortgage and upon Paragraph C of Section I of the supplemental mortgage in order to bind the new improvements and the personal property subsequently acquired, it might be arguable that the descriptions contained in those paragraphs are too vague and indefinite to be valid as against third parties; see *Turrentine* v. *Thompson*, 193 Ark. 253. But, as has been pointed out, such is not the case.

In support of their contention that the mortgages have "ambulatory" descriptions and are void as to them, the creditors cite Hughes, "Arkansas Mortgages", section 64, wherein it is said: "... A description is ambulatory if it fits one article at one time and another article at another time. Thus a mortgage by the owner of an operating mill of 50,000 feet of lumber 'of the last sawing', meaning that the mortgage should always cover the last 50,000 feet sawed is ambulatory and void." In support of that statement the author cites *Smith* v. *McCoy-Kessinger Lumber Co.*, 108 Ark. 162; and that case so holds. But we do not have here the situation presented in the Smith case. It is obvious that under a mortgage such as was involved in that case the property covered by the mortgage would vary from day to day in that a lot of lumber that was "of the last sawing" on one day would not be "of the last sawing" on the following day; in the instant case, however, we are not concerned with a mortgage under the terms of which property acquired by Westmoreland would be covered only temporarily; under the provisions of the mortgages here involved all property acquired by Westmoreland would be covered by such mortgages and would remain covered until the mortgages were satisfied. Of course, since the mortgages were construction mortgages, and since Westmoreland was to acquire properties with money to be ad-

vanced by the Government, the amount and value of the latter's security would increase as the project progressed, but that would not affect the validity of the mortgages. Any argument to the contrary would simply amount to a contention that after acquired property clauses in mortgages are void, which is not the law.

It is further argued by the creditors on this phase of the case that Section II of the supplemental mortgage* constitutes an admission that the descriptions of future acquisitions contained in the original mortgage and in the supplemental mortgage are void for indefiniteness. But the idea of such an admission is expressly negatived by the language of Section II which has been quoted. All that Section II accomplished was to give the Government the right to demand from time to time that new mortgages be given it specifically describing the items of property that had been acquired by Westmoreland at the times that such demands might be made; that the Government, out of an abundance of caution, desired that right does not imply that the existing descriptions were insufficient, and we have held that they were sufficient.

As to the joint venture theory advanced by the creditors, the contract between the Government and Westmoreland required the latter to produce and sell to the Government over a period of years 264,000 long, dry tons

* That section reads as follows: "While it is agreed that all future acquisitions by Mortgagor of real property, mineral interests and personal property shall, by virtue of the 'after acquired property' provisions of said Real Estate and Chattel Mortgage, and of this Supplemental Mortgage, be subject to the lien of each of said two instruments, nevertheless, to the end that such future acquisitions may be encumbered under instruments more specifically describing the same, Mortgagor agrees that it will, from time to time upon request of Mortgagee, execute, acknowledge and deliver to Mortgagee, and cause to be established of record, such additional instruments, on forms approved by Mortgagee, as may be necessary to encumber all such after acquired property items under a more specific description. The failure or refusal in any instance to execute such additional instruments and establish the same of record shall constitute a ground for the acceleration (at Mortgagee's option) of the maturity of the secured indebtedness additional to the events of acceleration recited in said Real Estate and Chattel Mortgage."

of manganese ore to be paid for at stated prices; in order to enable Westmoreland to acquire mineral lands, to build its plant, and to get into production the Government agreed to advance to Westmoreland not more than $3,807,250, including $155,000 which was to be advanced if, and only if, it should be determined that a "second slime pond" should be constructed. Of this sum of $3,807,250, $418,600 was to be used for land acquisition, $2,788,650 was to be used for the acquisition and completion of the new facilities, and $600,000 was to be used for working capital; all advances were to bear interest at the rate of 4% per annum. It was agreed that so long as any part of the moneys advanced by the Government should remain unpaid, the ownership and management of the corporation should be subject to governmental approval, and it was agreed that no substantial change in ownership or management would be made without the prior approval of the Government. It was agreed that Westmoreland might at any time repay its debt to the Government, either in whole or in part, and that upon expiration of the term of the contract, or upon prior termination thereof, any advances made by the Government that had not been repaid should be immediately due and payable. The contract further provided that Westmoreland might withdraw from net profits after taxes not more than $75,000 in any calendar year. It was further agreed that Westmoreland would make its facilities available for the processing at fair and reasonable charges to be fixed by the Government "any and all quantities of native run ore of types and kinds similar to those which are the subject matter of this agreement which are furnished by the Government from ores purchased by the Government from other producers in your area throughout the term of this contract", but not more than 10% of the ore to be processed by Westmoreland to be sold to the Government under the contract. Paragraph 7 of the contract provided that it should terminate upon the production of 264,000 long dry tons of ore from the facilities to be constructed, or upon the expiration of six years after commencement of production, or upon the repayment to the Government of all advances plus interest. Westmoreland was required to maintain proper books and records, and adequate insurance, and to submit certain periodic reports;

and the Government was given the right to maintain one or more representatives at the site of the work "to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation." The final paragraph of the contract recites that it was entered into pursuant to the Defense Production Act of 1950, as amended (Public Law 774, 81st Congress, and Public Laws 69 and 96, 82d Congress).

In the preceding paragraph we have endeavored to abstract those provisions of the contract upon which the creditors' claim of joint venture is based, and although the creditors urge that said contract constituted a joint venture between the Government and Westmoreland, we do not believe that any such relationship was created thereby or by the performance of the parties under it. In order to constitute a joint venture it is essential that there be a joint proprietary interest in the subject matter of the venture, a right of mutual control with respect thereto, and an agreement, express or implied, for the sharing of profits. 30 Am. Jur. "Joint Adventures", Sections 11 and 12. In *State ex rel. Attorney General* v. *Gus Blass Company*, 193 Ark. 1159, the Supreme Court of Arkansas held that there was no joint venture between the Gus Blass Company and one Gainsburg, who was operating an optical department in the former's store under a contract of lease, notwithstanding the fact that rent was paid out of net sales, that salaries of employees were advanced by the Company and charged to the lessee, and that the Company had a right to exercise control over who should be employed by the lessee. The Court, speaking of what was necessary to constitute a joint venture, said:

> "To constitute a joint adventure, there must be the elements of a partnership. As between the parties themselves there must have been an intention to form a partnership as expressed in the contract or gathered from acts of the parties and circumstances which may interpret such agreement. As between themselves or third parties, 'there are certain requisites necessary before the law will in any event regard the relationship as that of partners

> The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services and having a community of interests in the profits.' *Meehan* v. *Valentine*, 145 U. S. 611, ... The doctrine announced in this case was quoted with approval in *Cully* v. *Edwards*, 44 Ark. 423, 51 Am. Rep. 614. That case was followed in *Roach* v. *Rector*, 93 Ark. 521, ..., in which it was stated in effect that the parties to the contract must be co-principals in the business, and if it is owned by one, and the other receives the profits or a portion thereof, for services or otherwise, the relationship of partners does not exist. Quoting further from that case, it is said: 'As between the parties themselves, before it has been said that the relationship of partners has been created, it is essential that the parties themselves intended by the effect of their contract to form such a partnership business, and that they should have a common ownership and community of interest in the properties of the business, and they should share in some fixed proportion in the profits thereof only as profits of the business.'
>
> "These rules apply not only to a general partnership, but to a limited one, a joint adventure. The facts . . in the instant case . . . show that the parties did not intend to form a partnership, that they did not have a common ownership and community of interest in the property of the business, nor did they share in the profits in some fixed ratio. This being true, it follows that the contract was one of lease, ..." (193 Ark. at 1176-1177).

It is clear that under the contract involved here the Government had no proprietary interest in the Westmoreland properties whatever, other than the security interest created by the mortgages, and it is equally clear that in no event was the Government to share in any profits earned by Westmoreland. It is, of course, true that the Government was interested, in the discharge of its duty as a sov-

creign to provide for the national defense, in procuring manganese for stockpile purposes, and in that sense it would have benefited from Westmoreland's contemplated performance; but the receipt or expectation of benefits is common to almost all contracts; and it certainly cannot be said that because a contracting party benefits from the performance of the contract by the other they are joint ventures, or that the former is sharing in the profits earned by the latter as a result of his performance. Here, both parties were interested in the performance of the contract, but their interests were entirely different qualitatively; the Government was interested in the production of manganese for defense purposes, whereas Westmoreland was interested in financial profits.

The creditors lay stress upon the fact that the Government advanced, or agreed to advance the moneys that would be required by Westmoreland in order to perform the contract, and that the Government was not motivated in so doing by a desire to earn interest on the funds to be so advanced; but we deem that to be immaterial. It is not at all unusual for a party to advance money to another to enable the latter to produce or process articles for the purpose of thereafter selling them to the former; in such cases provisions for interest on the advances are ordinarily merely incidental to the main object of the parties. But such an arrangement does not constitute them joint ventures; in this connection in 30 Am. Jur. "Joint Adventures", Section 23, page 688, it is said: "Although one party's contribution to a joint adventure may be to provide the funds necessary to finance it, the mere fact that one loans or advances money to finance the scheme of another does not make him a joint adventurer with such other in carrying out the scheme. Nor, in general, does such a lender become a joint adventurer by reason of the borrower's agreement to pay him as compensation for advancing the money a share of the profits received; where the lender has no control over or interest in the scheme itself beyond such right to a share of the profits, and does not share in the losses." It is true that in the instant case the Government had a right to exercise, at least in a negative sense, certain control over Westmoreland in its operations; but that right

of control was reserved solely for the purpose of protecting its security interests and seeing that the money advanced by it was not used for unauthorized purposes; and it must be remembered that under the express terms of the contract Westmoreland at any time could have freed itself from governmental control simply by repaying the Government the moneys advanced, plus interest.

Counsel for the creditors insist on referring to the Westmoreland project as a "Government project". It was not a "Government project", but was Westmoreland's project financed by the Government to the extent agreed upon, and as authorized by the Acts of Congress referred to in the contract. Had Westmoreland completed the contract, then upon the expiration thereof, it would have owned the remaining ore body and the residual value of the plant, equipment and facilities, the Government having no interest therein.

In support of their claim of joint venture the creditors cite *Laser* v. *State, ex rel. McKinley, Commissioner*, 198 Ark. 945; *Fourth National Bank* v. *Portsmouth Cotton Refining Oil Co.*, 5 Cir. 284 F. 718; and *Dexter & Carpenter, Inc.* v. *Houston, et al*, 4 Cir., 20 F2d 647. None of those cases appears to be in point. In the Laser case no question of joint venture was raised; the Court simply held that under the facts in that case the lease arrangement there involved was "just a method of operating the coal mine by appellant (lessor) himself" for his own financial benefit; in the instant case Westmoreland was in no sense an agent of the Government; it was building a plant for its own use and benefit and was intending to mine and treat manganese ore to be sold to the Government, the profits to inure to the benefit of itself; furthermore, the control which the Government had over the operation was essentially negative, and, as stated, Westmoreland could free itself from that control at any time by discharging its debt. As to *Fourth National Bank* v. *Portsmouth Cotton Oil Refining Co., supra*, a reading of the opinion of the District Court *Portsmouth Cotton Oil Refining Co.* v. *Fourth National Bank*, DC, Ala., 289 F. 879) reveals that there the Court was concerned with a corporation that was, in effect, a

subsidiary of the Bank, and that the latter completely controlled and dominated all of its activities, and that it owned no property that had not been conveyed to it by the Bank. Here, Westmoreland was not a subsidiary of the Government; it had its own corporate existence and some assets before the Government ever came into the picture, and it was pursuing its own ends. True, the Government agreed to finance its operations, but as we have seen, that is not sufficient to create the relationship of joint venturers. *Dexter & Carpenter, Inc. v. Houston, et al, supra*, is not at all applicable here; there, two wholesalers agreed between themselves to lend money to third persons to purchase and operate a coal mine; as consideration for the loan the two companies were to be given the exclusive agency to sell the output of the mine for a period of years; it was held that in making this loan the two *wholesalers* were as between themselves, joint venturers, but it was not even suggested that either of them was engaged in a joint venture with the persons who were to buy and operate the mine.

Before leaving the question of joint venture it should be pointed out that we recognize that in certain circumstances there may be a joint venture by estoppel as to third parties, regardless of the relationship of the parties as between themselves. Here, however, there is no evidence that any authorized officials of the Government ever represented to anyone that the Westmoreland project was a joint venture between the Government and Westmoreland or ever took any action that would indicate that such was the case. Hence, there is nothing here upon which a finding of joint venture by estoppel can be predicated.

The creditors, in support of their claim that they were "third party beneficiaries" under the contract between the Government and Westmoreland, point to those provisions of the contract which required Westmoreland to construct its plant and produce manganese, and to make necessary commitments for supplies and services to enable it to do so, to those which obligated it to establish a separate bank account or separate bank accounts, to refrain from comingling funds advanced by the Government with its own funds, and to establish a counter-signature

system for the disbursement of funds advanced by the Government; and they lay particular emphasis upon Paragraph 5(c) of the contract which required Westmoreland to furnish the Government with "unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, which will be fully paid for through the advance of funds by the Government as prescribed herein". It is argued that those provisions were inserted for the protection of creditors, and that they were entitled to rely thereon. We reject that argument.

The requirement that Westmoreland should build the plant and should proceed to make necessary commitments for materials and services was, in our estimation, nothing more than expression of Westmoreland's primary obligation under the contract; of course, the Government desired for the plant to be constructed and operations commenced as soon as possible, and it desired to avoid unnecessary delays on the part of Westmoreland in making commitments for needed labor and materials. The requirements for separate bank accounts and for a countersignature system were, it seems obvious, inserted not for the benefit of creditors but for the protection of the Government's financial interests, and to insure that there was no dissipation or misappropriation of funds. The phrase in the contract that has been quoted did not amount, in our opinion, to an undertaking by the Government to see to it that everyone who supplied materials or services to Westmoreland would be paid out of the funds advanced by the Government; rather, it seems nothing more than a recognition that Westmoreland was to pay for such materials and services, and that it was to use the money advanced by the Government for that purpose. There is no undertaking that the funds to be advanced by the Government would be sufficient to pay all of Westmoreland's bills; in this connection it should be noted that the Government had no control over the commitments that Westmoreland might make, or with respect to the ultimate cost of the facilities; the Government did limit itself to an overall advance of $3,807,250, broken down into at least the three major categories of land acquisition, acquisition and construction of new facilities, and working capital; and it did have control

over the *disbursement* of funds advanced. Had the Government undertaken to protect the creditors or to underwrite all of Westmoreland's obligations, it is inconceivable to us that it would not have reserved some control over the liabilities that Westmoreland might incur, or have inserted some provision in the contract which would have protected it from uncontrolled expenditures by the contractor; but such was not done. To our mind, the third party beneficiary argument overlooks, as to some of the other arguments, that this was Westmoreland's project, and that it was the duty of the latter, rather than of the Government, to build the plant and pay for it; the only duties of the Government were to make advances under the terms of the contract, and to purchase manganese from Westmoreland and to pay the stipulated prices therefor.

Nor do we agree with the creditors that there are equities here that should move the Court to deny to the Government any priority to which it is otherwise entitled. The position of the creditors in this connection seems to be that they relied upon the Government to protect their interests and to see that they were paid; that the Government by reason of its control over the disbursement of funds could have protected them and that it failed to do so; that the Government did not advance to Westmoreland all of the money that it was supposed to advance, and for that reason should be denied priority; and that the Government, after the execution of Amendment No. 1 to the original contract, withdrew the balance in Westmoreland's special bank account amounting to $119,230.31, and that it should, in equity, be required, in any event, to make that sum available to be applied on the claims of the creditors.

The fallacy of those contentions lies in the fact that the Government contracted with Westmoreland and not with the creditors; there was no privity between the latter and the Government, the Government owed them no duty to protect their interests, and there is no evidence here that any Government official ever took any action that would have entitled any of the creditors to rely upon the Government for the satisfaction of its claim.

Apart from Crow-Burlingame Company and Bragg's Electric Construction Company, there is no evidence that any of the creditors in fact relied upon the Government in extending credit to Westmoreland; but assuming for purposes of argument that in extending such credit they did rely generally upon the Government, in the sense that they thought that the latter would see to it that they were paid, they had no right under the contract so to do. If they are to prevail under the theory now under discussion, they must show that some responsible official of the Government took some action calculated to lead them to believe that the Government would protect their interests, and that they relied upon such action when they extended credit to Westmoreland. This, they have failed to do.

There is no evidence here that any authorized agent of the Government ever at any time made any statements or took any action that would indicate to the creditors that the Government was underwriting Westmoreland's obligations, or that in controlling Westmoreland's disbursements, or otherwise, it was purporting to protect the interests of the creditors, or doing anything except protecting its own interests. As we have said, the Government had no control over Westmoreland's commitments or over the ultimate cost of the project; and, furthermore, it had nothing to do with initiating payments to any creditor. That initiative lay entirely with Westmoreland; when its officials would submit an invoice and check to the Dallas Office of the General Services Administration, Mr. R. B. Chapman, who was the Regional Disbursing Officer at that office, would check to see whether or not there were funds available to pay such invoice, and if there were, and if the invoice and check were in proper order, he would countersign the check and mail it to the payee thereof; otherwise, it would be returned to Westmoreland. We do not think that the mere fact that from time to time the creditors received checks which had been countersigned by Mr. Chapman, gave them any right to assume that the Government was guaranteeing the payment of their accounts, or that the counter-signature system had been devised for their benefit or protection.

Moreover, aside from what the creditors may have thought about the matter, the fact remains that Mr. Chapman was not a contracting officer and had no authority to bind the Government to pay any claim, or to guarantee the payment of any claim. He was simply a disbursing officer whose functions were essentially ministerial. It is a well settled principle of law that all agents of the Government are special agents with limited authority; and all parties dealing with them are charged with notice of that fact and of the limitations upon the authority of the agents with whom they deal.* As pointed out in our first memorandum, the responsible Government officials who were charged with the administration of this contract were Mr. John G. Ford, Director of the Contracts Negotiation Division of the Defense Materials Procurement Administration, and his deputy, Mr. Arthur L. Sherman, and that fact could have been easily ascertained by inquiry on the part of any of the creditors. There is no evidence that any of the creditors ever inquired of either Mr. Ford or Mr. Sherman, or of any of their superiors in the D.M.P.A., whether or not the Government was standing behind Westmoreland's obligations; such inquiry could have readily been made, and had it been made, the inquiring creditors, we are satisfied, would have been promptly informed that the Government was not guaranteeing the payment of any claims.

Now, the evidence does show that certain conversations were had on different occasions between Mr. Chapman and representatives of Crow-Burlingame and Bragg's Electric Construction Company, respectively; we have carefully considered the testimony bearing upon those conversations, and we do not think that it can be fairly said that in the course thereof Mr. Chapman undertook on behalf of the Government to guarantee the payment of the respective claims of the two creditors just mentioned, or to assure their representatives that their claims would be paid in any

* Without intimating that the distinction is of importance here, we point out in passing that we are satisfied that in its dealings with Westmoreland the Government was acting in its sovereign or governmental capacity, rather than in a "proprietary" capacity. In acquiring manganese for stockpiling purposes the Government was acting entirely in the interest of national defense.

event out of Government funds; nor do we feel that the representatives of those two creditors could have reasonably so understood. But even were the case otherwise, the fact remains that Mr. Chapman was simply a disbursing officer, and all parties dealing with him were charged with notice of the limitations on his authority.

With particular reference to the second conversation between Mr. Chapman and the representatives of Bragg's, it appears that Mr. Chapman said, in effect, that if approved invoices for the balance of Bragg's contract should be presented, checks in payment therefor would be countersigned; and had those invoices been in fact presented, payment might well have been made. As stated, however, Mr. Chapman could not initiate any payments to Bragg's or to any other creditor, and it does not appear that Westmoreland ever presented for counter-signature any check or checks in payment of the balance due Bragg's.

As to the action of the Government in declining to advance moneys to the full extent of its orignial contractual obligations, it should be repeated that the Government's obligations ran exclusively to Westmoreland and not to the creditors. Therefore, even if the Government failed to advance all of the moneys that it should have advanced, the creditors would be in no position to complain thereof. It should be said, however, that the creditors' assertion that the Government did not advance all of the moneys that it was required to advance is not strictly accurate from a factual standpoint. Under the contract advances were to be made to Westmoreland only upon the latter's request, and there is no question that the Government advanced to Westmoreland all of the moneys which the latter requested to be advanced under that contract, the last request being made about January 12 and being honored by a deposit to Westmoreland's credit in Special Account No. 1 around February 14; and the evidence further shows that even after the Government took the position that it was not required to countersign checks drawn on flow sheet categories that were overrun, it continued, up until the execution of Amendment No. 1, to honor checks drawn on categories that were not overrun. It should be re-

membered that the Government was never obligated to advance for construction purposes, or for the purchase of material and equipment, funds earmarked for working capital; and by March 6, 1953, it had been admitted by Westmoreland that there was an overrun of more than $500,000 in the major category of funds earmarked for construction and acquisition of new facilities, and Westmoreland had requested the Government to advance additional funds over and above its original commitment to take care of that overrun. Whether the Government was justified in refusing after the latter part of February, 1953, to honor checks drawn on overrun minor categories or not, a question which we did not decide in connection with the dispute between the Government and Westmoreland, and which we do not decide now, certainly it was contending that it was not required to honor such checks, and it was clearly not obligated to advance Westmoreland additional money over and above the amount originally contracted for. Under such circumstances, we do not think that the Government in refusing to countersign checks drawn on overrun categories acted so unreasonably or oppressively with respect to the creditors, to whom it owed no contractual duty whatever, as to deprive it of its right to priority here, if such right otherwise exists. As far as purely moral obligations are concerned, it seems to us that the obligations that the Government officials owed to the people of the United States in general to protect the public purse was equal to or greater than any supposed moral obligation that it may have owed to the creditors.

As to the withdrawal of the balance in Special Account No. 1, which was effected pursuant to Amendment No. 1 to the original contract, that also was a matter purely between Westmoreland and the Government. Moreover, although it may be conceded that the reason for the withdrawal of that balance was to prevent it from being seized by any one or more of the creditors, it should be kept in mind that the Government had a lien on that account whereas the creditors did not.

While the matter was not argued in the briefs, we feel that some reference should be made to a press release

which the Government issued contemporaneously with the execution of Amendment No. 1, copies of which release were circulated among the creditors. That release, in our eyes, would tend to create the impression that Westmoreland's application for additional funds was to be given early and favorable consideration, and that the Government had no thought of terminating the contract. Had the evidence showed that any of the creditors had extended credit to Westmoreland on the strength of the press release, or in reliance thereon had failed to take any steps available to them that would have protected their interests or improved their positions, an equitable argument could be made on behalf of such creditors. Such, however, is not the case. It is clear that no creditor extended credit to Westmoreland after the execution of Amendment No. 1, and there is no showing that any creditor refrained, on the strength of the press release, from taking any steps that it would have taken but for such release. Therefore, we consider that the release has no significance here.

Having disposed of the contentions common to all of the creditors, we now turn to a consideration of what we consider to be really the crucial issue involved in the dispute which is the subject of this memorandum, namely, whether or not under the Arkansas lien statutes that have been mentioned the lien claimants are entitled to priority over the Government, a question that we consider to be entirely one of Arkansas law. Prefatory to a discussion of that issue it may be said that counsel have not cited us to any case, nor have we found a case that we consider to be dispositive of said issue, although a number of Arkansas cases have been cited and discussed which are applicable here, as far as they go. In taking up the question of priority as between the Government and the lien claimants under the Arkansas statutes it will be desirable at the outset to quote the pertinent provisions of those statutes, and to state certain general principles announced by the Supreme Court of Arkansas in regard thereto.

The relevant parts of the Arkansas mechanics' and materialmen's lien statute, which has been cited and which

for simplification we shall refer to as the "Mechanic's Lien Statute",* are as follows:

> Ark. Stats., Section 51-601: "Every mechanic, builder, artisan, workman, laborer, or other person who shall do or perform any work upon, or furnish any material, fixtures, engine, boiler or machinery for any building, erection, improvement upon land, ... under or by virtue of any contract with the owner or proprietor thereof, ... upon complying with the provisions of this act, shall have for his work or labor done, or materials, fixtures, engine, boiler or machinery furnished a lien upon such building, erection or improvement, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of one acre; ..."
>
> Ibid., Section 51-604: "The entire land, to the extent aforesaid, upon which any building, erection or other improvement is situated, including as well that part of said land which is not covered with such building, erection or other improvement as that part thereof is covered with the same, shall be subject to all liens created by this act to the extent and only to the extent of all the right, title and interest owned therein by the owner or proprietor of such building, erection or other improvement for whose immediate use or benefit the labor was done or things were furnished."
>
> Ibid., Section 51-605: "The lien for the things aforesaid, or work, shall attach to the buildings, erections or other improvements, for which they were furnished or work was done, in preference to any prior lien or incumbrance or mortgage existing upon said land before said buildings, erections, im-

* Actually, none of the creditors here is a "mechanic" in the strict sense of the term, or a "laborer". Most of the lien claimants are materialmen, although Latrobe Construction Company supplied only labor for the Westmoreland project, and Bragg's Electric Construction Company supplied both labor and material. All laborers, however, appear to have been paid in full, either by Westmoreland or by Latrobe or Bragg's, as the case happened to be.

provements or machinery were erected or put thereon, and any person enforcing such lien may have such building, erection or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter; provided, however, that in all cases where said prior lien or incumbrance or mortgage was given or executed for the purpose of raising money or funds with which to make such erections, improvements or buildings, then said lien shall be prior to the lien given by this act."

Ibid., Section 51-607: "The lien for work and materials as aforesaid shall be preferred to all other incumbrances which may be attached to or upon such building, ... or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements."

Ibid., Section 51-611: "The liens for work and labor done or things furnished as specified in this act shall be upon an equal footing, without reference to the date of filing the account or lien; and in all cases where ... sale shall be ordered and the property sold, which may be described in any account, or lien, the proceeds arising from such sale when not sufficient to discharge in full all the liens against the same without reference to the date of filing the account or lien, shall be paid *pro rata* on the respective liens; ..."

The relevant portions of the "Miners' Lien Statute" are as follows:

Ark. Stats., Section 51-701: "Any person, corporation, firm, association, partnership, materialmen, artisan, laborer or mechanic, who shall under contract express or implied, heretofore or hereafter made, with the owner or lessee of any land, mine or quarry, ... perform labor or furnish fuel material, machinery or supplies, used in the digging, drilling, torpedoing, operating, completing, equipping, maintaining or repairing any such ... mine or quarry, ...

shall have a lien on the whole of such land or leasehold interest therein, or oil pipe line, or gas pipe ... line, ... the buildings and appurtenances, and upon the materials and supplies so furnished, and upon said oil or gas pipe line, mine or quarry for which same are furnished, and upon all of the other ... buildings and appurtenances, including pipe line, leasehold interest and land used in operating for ... minerals, upon such leasehold or land or pipe line ..., for which said material and supplies were furnished or labor performed, whether the same are movable or not ..."*

Ibid., Section 51-704: "The lien hereby given against the land ... and the oil pipe line or gas pipe line, ..: situated thereon, upon the materials and supplies so furnished and upon said ... mine or quarry for which such materials were furnished, or labor performed ... shall be prior and paramount to and in preference of any and all subsequent liens, encumbrances and mortgages and except as hereinafter provided all liens established hereunder shall be equal dignity. The lien herein provided for shall attach to the machinery, material, supplies and the specific improvements made, in preference to any prior lien or encumbrance or mortgage upon the land or leasehold interest upon which the said machinery, material, supplies or specific improvements are placed or located, provided, however, that any lien, encumbrance, or mortgage upon the land ... at the time of the inception of the lien herein provided for, shall not be affected thereby; and the holders of such liens upon such land or leasehold interest shall not be necessary parties in suits to foreclose the lien hereby created."

Ibid., Section 51-706: "The provisions of this act shall not be construed to deprive or abridge

* While we are not here concerned with any oil or gas well or with any pipe line, the provisions of Section 51-701 and of other sections of the statute relative to pipe lines are included herein in view of our following discussion of Bennett v. Weis, 205 Ark. 198; and Superior Oil Co. v. Etheridge, 219 Ark. 289.

materialmen, artisans, laborers, or mechanics of any rights and remedies, now given them by law, and the provisions of this act shall be cumulative of the present lien laws of this State except as herein repealed or modified."

Ibid., Section 51-708: "Except as herein expressly provided, the lien hereby created shall be construed, established, preserved and enforced in like manner and in the same time as liens of mechanics are now construed, established, preserved and enforced, provided that where the labor performed, or material, supplies or machinery furnished was under an open, running account, the same shall be construed as a continuous contract, and the time within which the verified statement of the claim for lien shall be filed with the clerk of the circuit court shall be computed from the time upon which the last labor was in good faith performed, or the last material, machinery or supplies were in good faith furnished and the lien hereby provided for shall, when perfected, in the manner herein set out, be held in law and equity as security for the entire open, running account, whether the same has been partially closed by note or not . . ."*

From a reading of the first section of the Mechanics' Lien Statute (Ark. Stats., Section 51-601) it is clear that one who supplies labor, material, machinery or equipment for any building, erection or improvement upon land has a lien, as against the landowner (in this case Westmoreland), upon such building, erection or improvement and upon the land itself to the extent of one acre; it is equally clear from the fifth section of the statute, however (Ark. Stats., Section 51-605), that as against a prior mortgagee, such as the Government in this case, the mechanics' lien created by the statute extends only to the improvement itself, the mortgage on the underlying land retaining its superiority; moreover, where material or labor is fur-

* It should be said at this point that no question has been raised with regard to the perfecting in the manner prescribed by the respective statutes of any of the liens involved in this case.

nished for an improvement, before the mechanics' lien is held to be superior to a prior mortgage, it must appear that the new improvement is separate and distinct from existing improvements, or can be removed therefrom without injury thereto. The principles just stated have been recognized by the Supreme Court of Arkansas in at least the following cases: *Gunter* v. *Ludlam*, 155 Ark. 201; *Imboden* v. *Citizens Bank*, 163 Ark. 615; *Fine* v. *Dyke Bros.*, 175 Ark. 675; *Morrilton Lumber Co.* v. *Groom*, 176 Ark. 520; and *Barton Lumber & Brick Co.* v. *Caraway*, 178 Ark. 1034: Furthermore, the priority section of the statute itself recognizes by its provision for a separate sale of the improvement under execution that the priority of an existing mortgage on the underlying land is not to be disturbed; and that method of enforcing a mechanic's lien upon an improvement, as against a prior mortgagee, was held to be exclusive in *Morrilton Lumber Co.* v. *Groom*, *supra*. It should be noted, however, that such a lien may be held superior to a prior mortgage even as to the underlying land where a contractual vendor or a mortgagee requires a vendee or mortgagee to make improvements to the property, which would enhance the value of the security, while not advancing or agreeing to advance any funds for the making of such improvements. *Wildwood Amusement Co.* v. *Stout Lumber Co.*, 178 Ark. 977; *Peoples B. & L. Ass'n* v. *Leslie Lumber Co.*, 183 Ark. 800.

While ordinarily a mechanic's lien takes priority over a prior mortgage to the extent of the new improvement constructed on the land, an exception exists under Section 5 of the statute in cases where the "prior lien or incumbrance or mortgage was given or executed for the purpose of raising money or funds with which to make such erections, improvements, or buildings"; in such case the mortgage is entitled to priority both with respect to the land itself and with respect to the improvements erected thereon. Ark. Stats., Section 51-605; *Shaw* v. *Rackensack Apartment Corporation*, 174 Ark. 492; *Sebastian County Bldg & Loan Ass'n* v. *Minton* 181 Ark. 709; and *Ashdown Hardware Co.* v. *Hughes*, Ark. , 267 SW 2d 294. The cases just cited likewise hold that in applying Section 51-605 it is the purpose for which the loan is made, rather

than the use to which the money is actually put, that is controlling. Where a construction mortgage secures future advances, it is superior to intervening mechanics' liens where the making of such future advances is obligatory, but not where such advances are optional with the mortgagee. *Ashdown Hardware Co.* v. *Hughes, supra.*

In order for a materialman to establish a lien under the statute now being discussed, he must show that the materials furnished by him were actually used in the work; a mere delivery of materials to the site for the purpose of incorporation into the improvement is not sufficient to give him a lien under this statute, although such delivery constitutes *prima facie* evidence that the material was in fact used in making the improvement. *Meek* v. *Parker*, 63 Ark. 367; *Central Lumber Company* v. *Braddock Land & Granite Co.*, 84 Ark. 560; *Van Houten Lumber Co.* v. *Planters' National Bank*, 159 Ark. 535, 540; *Standard Lumber Co.* v. *Wilson*, 173 Ark. 1024, 1031; and *Sebastian Building & Loan Ass'n* v. *Minten, supra*, 181 Ark. at 712. That principle is applicable here, to the extent that the lien claimants rely upon Mechanics' Lien Statute, because it is stipulated that some of the material furnished by certain of the lien claimants was never incorporated into the improvements, and is now in storage at the plant site.

Turning now to the Miner's Lien Statute, it should first be noted that the remedy thereby provided for those who supply labor or materials for a mine is cumulative to that given by the Mechanics' Lien Statute, and that such remedy is to be construed, established, preserved and enforced as is that provided by the statute last mentioned. An examination of the Miners' Lien Statute, however, reveals that it is broader than the Mechanics' Lien Statute in three respects which are important here: First, whereas the rights in land of one who claims a lien under the Mechanics' Lien Statute are limited to a maximum extent of one acre, there is no such limitation found in the Miners' Lien Statute, and one who is entitled to the benefit of that statute has a lien on the whole of the land constituting the mine. Second, as has been pointed out, the Mechanics' Lien

Statute has a proviso to the effect that where a prior mortgage is given to secure advances of funds made to enable the property to be improved, the mortgage has priority over subsequent mechanics' liens; no such provision appears, however, in the Miners' Lien Statute, and we do not think that it can be read into it by interpretation. Finally, before a person is entitled to a lien under the Mechanics' Lien Statute for materials furnished, he must show that his materials went into the improvement; under the Miners' Lien Statute, however, one who supplies material, machinery or equipment for a mine that never becomes appurtenant to the realty is entitled to a lien on such items as he himself furnishes, but not to a lien on personal property furnished by others which never became attached to the land. *Bennett* v. *Weis*, *supra*, 205 Ark. at 202.

With regard to priority under the Miners' Lien Statute, persons who supply labor or materials for a mine have a lien which is prior to all subsequent encumbrances, but which is inferior to existing mortgages upon the land and upon items of property and equipment described in such mortgages.

In *Estep* v. *Blue Ribbon Coal Company*, 177 Ark. 83, the facts were that laborers worked in and about a coal mine which was being operated under a lease; the lease and certain machinery and equipment on the mine site were mortgagd to the First National Bank of Paris, the mortgage having been given prior to the time that the laborers performed any work. The Court held that the lien of the mortgage was superior to those of the laborers. After quoting the priority provision of the statute, the Court went on to say:

> "The statutory lien given to the miners for work done in operating the mine could not become paramount to a prior recorded mortgage unless the statute creating the lien manifests an intention to give it preference. . .
>
> "It is true it is expressly provided that the lien given the laborers shall attach to the machinery, material, etc., in preference to any prior lien, incum-

brance, or mortgage upon the land or leasehold interest upon which the said machinery, material, supplies and specific improvements are placed or located, provided that any lien, incumbrance or mortgage upon the land or leasehold interest at the time of the inception of the lien herein provided for shall not be affected thereby. The inception of the statutory lien could not have been before the material and supplies were begun to be furnished and the labor done, and it was not the intention of the statute to make the lien of the laborer or materialman superior to the lien of the prior mortgage upon the leasehold interest and equipment of the mine before the inception of the lien given the labor by the statute which expressly declares that such mortgage lien shall not be affected thereby. It was obviously not intended that the laborer or material furnisher should have a superior lien upon the leasehold and equipment of the mine to the lien of the mortgage existing at the inception of the statutory lien. In other words, at best, the statute, under a fair construction, cannot be held to intend the giving of a lien to laborers and material furnishers on the materials, improvements and equipment of the mine already installed and covered by a valid mortgage of the leasehold at the inception of the statutory lien, which could attach only to such machinery, material and specific improvements thereafter installed becoming superior to the mortgage lien therefor" (177 Ark. at 85-87).

And in *Roberts* v. *Tice*, 198 Ark. 397, 405, the Court, speaking of what is now Ark. Stats., Section 51-704, said:

"... In other words, a prior lien, encumbrance or mortgage on the land or leasehold only shall not come ahead of laborers and materialmen's rights to liens on the machinery, materials, supplies and specific improvements not specifically covered by the prior lien, encumbrance or mortgage, and justly so. If laborers and materialmen perform labor and furnish material to improve a leasehold already

covered by a mortgage or other encumbrance, their right to a lien on the improvements is paramount, but not so the leasehold."

Returning for a moment to the extent of the lien conferred by the Miners' Lien Statute, we desire to discuss briefly the cases of *Bennett* v. *Weis* and *Superior Oil Company* v. *Etheridge*, both *supra*:

In *Bennett* v. *Weis* one Thompson owned an oil and gas Lease in Lee County, Arkansas, and contracted with one Howard to drill an oil well thereon; Thompson agreed to pay Howard a certain sum for drilling the well, and also supplied three hundred feet of "surface pipe"; Howard borrowed a drilling rig from Bennett under a profit-sharing arrangement, and he also borrowed a steel derrick owned by the United States Oil Company. Weis, the plaintiff, was a dealer in oil, gasoline and other merchandise, and he furnished supplies and materials for use in connection with the drilling operation; his account being unpaid, he filed suit seeking to impress a miner's lien upon the lease, the drilling rig, the pipe, and the derrick, and he prevailed in the Chancery Court. On appeal the decree of the Chancellor was affirmed in part and reversed in part. The Supreme Court held that Weis was entitled to a lien on the lease and on the pipe, but not with respect to the drilling rig or the derrick because the latter was not appurtenant to the land.

In determining the extent of a miner's lien the Court said: "Our statute, by its terms, give materialmen and laborers a lien (a) on the land or lease; (b) on oil pipe lines; (c) on buildings and appurtenances; (d) on materials and supplies *furnished by the seller*; (e) on all other wells, buildings, appurtenances, etc." (205 Ark. at 202). [Emphasis added.] The Court further said: "It is difficult to draw a distinction between the machinery and the derrick, although some of the judges think such a distinction existed insofar as the record is concerned because of a failure to show that the derrick was only temporarily attached to the soil. All agree that the statute gives a lien on the pipe. Some of the judges think . . . that machinery, derrick and pipe were appurtenances" (Ibid. at 203).

In *Superior Oil Co.* v. *Etheridge*, Superior Oil Co. entered into a contract with one McSpadden to drill an oil well on a lease owned by it, and Etheridge furnished the labor and materials necessary to build a wooden access road to the drill site; it was held that Etheridge had a lien on the lease and on several thousand feet of oil well casing which Superior had purchased "in the regular course of business" and had "transported to and stored upon the property ... for its own use" (219 Ark. at 292-293). In holding that Etheridge had a lien on the pipe the Court said: "The case at bar has aspects like that of *Bennett* v. *Weis*, 205 Ark. 198, ... In that case Thompson owned oil and gas leases and made a contract with Howard to drill a well and furnish Howard 300 feet of surface pipe. Bennett let Howard have a drilling rig; and the question was as to the extent of the lien of the material supplier, Weis. We held that Weis had no lien on Bennett's rig; but we sustained the lien of Weis, the supplier, 'as to the surface pipe and the lease'. In short, we held that the lease and pipe of Thompson, the leaseholder, were subject to the lien of the supplier. Under the authority of that case the pipe on the drill site and also the lease of Superior ... were properly subjected to the lien of Etheridge" (219 Ark. at 296-297).

It is clear from a reading of the Bennett case that the Court there held that under the Miners' Lien Statute a supplier of materials has no lien on items of machinery which do not become appurtenant to the land, unless he supplies them himself. It should be noted, however, that the Court allowed Weis a lien on the pipe, some of the judges being of the opinion that it was an appurtenance, and the other judges apparently being of the opinion that it constituted a "pipe line" within the meaning of the statute. In the Etheridge case it is clear that the casing there involved was not appurtenant to the land since it was simply stored at the drill site, but, nevertheless, Etheridge's lien was held to apply to it, although he had not furnished it. This was done expressly on the authority of *Bennett* v. *Weis*; had the Court been of the opinion that Etheridge was entitled to a lien on all personal property on the lease, regardless of who supplied it, the effect of the decision would have been to overrule the general holding in the Bennett case, which

has been mentioned; the court obviously, however, did not intend to overrule or impair *Bennett* v. *Weis*. It seems clear, therefore, that a majority of the judges in the Bennett case, and all of the concurring judges in the Etheridge case felt that an oil well supplier is entitled to a lien on all pipe on the lease, whether appurtenant to the land or not, not on the basis that such a supplier is entitled to a lien on personal property on the lease in general, regardless of who supplies it, but on the theory that all pipe on an oil or gas lease is a pipe line within the meaning of the statute. On that basis what may appear to be a conflict between the two cases is readily resolved. We conclude, therefore, that the basic holding in *Bennett* v. *Weis* has not been impaired.

With the foregoing principles in mind, we now approach the task of applying those principles to the several kinds of property involved in this case so as to determine the relative priorities of the Government and of the creditors under each of the two lien statutes, each type of property being considered separately. Before doing so, however, we deem it well to point out that we are satisfied, although the creditors argue to the contrary, that under the terms of the contract between Westmoreland and the Government, the latter was required to make future advances of funds to the former in order to enable it to perform its contractual obligations, at least so long as Westmoreland performed its part of the bargain. Hence, the future advances contemplated in the contract and mortgages were obligatory in nature, and when made would relate back to the date of the mortgages.

The several types of property with which we are concerned are: (a) the lands purchased by Westmoreland, together with the improvements existing thereon at the time of the execution of the Government's mortgages; (b) the new improvements placed on said lands by Westmoreland pursuant to its contract with the Government; (c) personal property acquired by Westmoreland in connection with its proposed construction and with its proposed operations and now located on its lands and in the custody of the Receiver herein. The personal property just referred to may

be conveniently subdivided into three categories, namely: personal property, consisting of supplies and materials furnished by a number of the lien claimants here for incorporation into the proposed new plant, but which were never in fact incorporated thereinto; personal property acquired by Westmoreland from others than the lien claimants, exclusive of the automotive equipment to which the judgment creditors lay claim; and, finally, the automotive equipment just referred to, none of which, incidentally, was supplied by any of the lien claimants or any of the judgment creditors, and all of which, with the apparent exception of the Willys jeep referred to in the original mortgage, was paid for with funds advanced by the Government under the provisions of the contract.

Taking up first the question of the lands themselves and improvements existing thereon as of the date of the mortgages, and assuming for the moment without discussion that the Miners' Lien Statute is applicable in this case,* it is clear to us that as far as said lands and existing improvements are concerned the Government is entitled to priority over the lien claimants to the full extent of its claim. As stated, the Government's mortgages were executed on May 22, 1952, and at the same time the Government advanced to Westmoreland the sum of $418,600 to pay for such lands and improvements; at that time none of the lien claimants had supplied any services or materials to Westmoreland. Thereafter the Government made further advances to Westmoreland totalling more than $2,000,000.00, which sums it was required to advance under the contract, and the repayment of which was secured by its mortgages. As we have seen, neither the Mechanics' Lien Statute nor the Miners' Lien Statute accords priority to the lien created thereby over a prior mortgage as far as the land and existing improvements are concerned. As a matter of fact, the lien claimants concede that the Government is entitled to priority as to the land and existing improvements to the extent of the $418,600 which the Government advanced to pay for the same, and we do not believe

* As will be hereinafter pointed out, the Government takes the position that the Miners' Lien Statute does not apply to this case at all.

that they seriously contend that the Government is not entitled to priority as to this category of property to the full exent of its claim.

The only possible basis upon which the lien claimants could assert any priority with respect to the land and the improvements thereon at the time of the mortgages is the holdings of the Supreme Court of Arkansas in *Wildwood Amusement Co.* v. *Stout Lumber Co.* and *Peoples B. & L. Ass'n* v. *Leslie Lumber Co.*, both *supra;* but we are satisfied that both of those cases are readily distinguishable from the instant one.

In the Wildwood Amusement Company case the owner of a lease sold the same under a conditional sales contract, retaining title in itself until the purchase money notes were paid; as part of the contract the vendee was required to make certain improvements on the property at his own expense; the improvements were made but not paid for, and it was held that the mechanics' lien was superior to that of the vendor, apparently both as to the lease itself and as to the improvements thereon. The Court said:

> "... (A)s we have already stated, the contract of sale required the purchaser to make the improvements which were made, and at their own expense. The title to the whole property was retained in appellant, including all improvements to be erected on the lease ..., the effect of which was to constitute (lessee) the agents of the Wildwood Amusement Company for this purpose, as it required them to make these improvements to their property, and which was to remain their property until all the purchase money notes had been paid in full. Under these conditions we think it would have been no different had the Wildwood Amusement Company itself erected these improvements before the sale and required the purchasers to pay therefor in the contract of sale ..." (178 Ark. at 979).

In the Leslie Lumber Company case a contractual vendor sold certain property and required the vendee to make improvements thereon; the vendor did not originally

advance any money for the purpose of making improvements or agree to do so. After the improvements had been commenced, and after mechanics' liens had attached, the vendor did agree to advance certain funds to the vendee for improvement purposes and took a mortgage to secure the advance. It was held that the mechanics' lien was superior to the vendor's lien on both lands and improvements; the mortgage was not discussed since it was obviously inferior to the mechanics' liens which had attached prior to its execution. The basis of the decision was estoppel.

In the instant case we do not have a situation where a landowner enters into a contract of sale, retaining title to the property, and as a condition thereof requires the vendee at his own expense to make improvements, which would enhance the value of the security, without advancing or undertaking to advance any money himself for that purpose; nor do we have a situation where one agrees to advance funds for improvements, taking a mortgage as security therefor, after such improvements have already been commenced and after the liens of laborers and materialmen have already attached. The Government here never owned the land which Westmoreland purchased, but, on the other hand, advanced moneys to enable Westmoreland to buy the land from third persons, and obligated itself to advance additional moneys for the improvement of the property at a time when none of the lien claimants had furnished any services or materials. As indicated, the Leslie Lumber Company case was decided on grounds of estoppel; the Wildwood Amusement Company decision was based upon agency, but it also might well have been grounded on estoppel. Here, we have no elements of either agency or estoppel.

In taking up the question of priorities as to the improvements placed upon the lands by Westmoreland under its contract with the Government, we deem it well to consider first the argument, advanced by the Government, in its final brief, to the effect that the lien claimants here are not entitled to protection under the Miners' Lien Statute because the services and materials furnished by them were not furnished to a "mine" but rather to a

"beneficiation plant", which, the Government contends, is not a "mine" within the meaning of the statute.* While this argument of the Government has the virtue of simplicity, we have been cited to no authority which sustains it, and we have found no such authority. While it may be conceded that strictly speaking, a "manganese mine" consists only of the ore bearing lands, and that the "mining" of manganese is a surface operation, consisting in the removal of overburden and the digging of the exposed ore by means of earth moving machinery such as bulldozers, draglines, and the like, it does not necessarily follow that such a strict construction of the word "mine" is to be used in applying the Miners' Lien Statute. The statute itself provides that it shall be construed as is the regular Mechanics' Lien Statute; and as early as 1869 the Supreme Court of Arkansas in *Galbreath* v. *Davison*, 25 Ark. 490, 493-494, speaking of the construction that should be given to such a statute, said:

> "While it is true that this is a statutory proceeding, and cannot be construed to apply remedies beyond the declared intent and meaning of the Legislature, a large majority of the State courts have holden that (mechanics' lien statutes) are meritorious remedial laws, and should have a liberal interpretation. They should be so construed as not to defeat the spirit, true intent and meaning of the

---

* The material portions of the Government's argument on this point are as follows: "... The statute was obviously written for the protection of laborers and suppliers concerned with the drilling oil and gas lines. It was only incidentally intended to have broader application. Under Section 51-701, a lien is given to any person who furnished labor or material 'used in digging, drilling, torpedoing, operating, completing, equipping, maintaining, or repairing' a 'mine'. The washing and concentrating plant constructed by Westmoreland ... has nothing to do with the **mining** of manganese. It is a beneficiation plant. The 'mining' is done with the use of draglines, shovels, and heavy hauling equipment. ... None of the labor or machinery and supplies used in the construction of the washing and concentrating plant were 'used in digging, drilling, torpedoing, operating, completing, equiping, maintaining, or repairing' of a 'mine'. The washing and concentrating plant could as well have been located in Little Rock, Arkansas, as at Cushman. It it had been so located, we doubt if any of the parties ... would have argued that

acts, and that such laws have been wisely enacted to encourage valuable and permanent improvements, and to secure the industrious mechanic his reasonable reward.

"Such laws were not intended to create liens upon mere personal chattels, but upon lands or things in some manner attached to the realty; not to embarrass commerce, or hinder the ready exchange of purely personal property, but to secure the erection of valuable structures and protect the interests of him who may furnish materials and build the same."

Other Arkansas decisions announcing the same view are: *White* v. *Chaffin*, 32 Ark. 59; *Buckley* v. *Taylor*, 51 Ark. 302; *Wildwood Amusement Co.* v. *Stout Lumber Co.*, *supra*; and *Rea* v. *Lammers*, 212 Ark. 792.

Bearing in mind the liberal construction that is to be given the statute, we do not believe that under the circumstances here presented any distinction should be drawn between the ore bearing lands of Westmoreland and the structures that were placed thereon or immediately adjacent thereto, including materials supplied for such structures, whether actually incorporated thereinto or not; and we reject the Government's argument in the connec-

---

the lien created by Section 51-701 attached thereto. The 'mine' in a manganese operation consists of the ore-bearing lands. The statute does not say 'mining operation'; it does not apply to the different states in **refining** or processing ore **already mined.** ... Assuming that the materials, labor and supplies used in the construction of the washing and concentrating plant are held by the Court to fall within the language of Section 51-701, it is clear that said lien would cover only the land, the buildings, and appurtenances, ... If the mine had been **operated**, then this lien would have extended to the **'other'** buildings and appurtneances. However Westmoreland's mine was never operated ... With regard to the quonset building built by Westmoreland to house its business offices and operating shops, we further contend that although it is a building, it was not located upon the 'mine' and, further, it was not such 'other building' as was used in 'operating' for the production of manganese since said plant never got into operation" (Government's Final Brief, pp. 40-41 and 43).

tion. A reading of the contract discloses that the mere surface "mining" of manganese ore was not the sole, or even the primary object of the contracting parties; the real purpose of the parties in entering into the contract was the refining of raw ore, and the sale of the refined ore to the Government. In order for the purpose to be accomplished it was necessary that the beneficiation plant and other improvements be constructed; the contemplated operation was a continuous and integrated one, consisting not only of the digging of ore, but also of the transportation of the ore over Westmoreland properties to the plant, and the treatment of such ore. Keeping in view the purpose of the contract, it seems to us that the relationship between the ore body and the beneficiation plant was so intimate and direct, that the latter should be treated as a part of the mine. And, to our mind, the parties to this litigation did, in effect, so treat it during all of the course of the trial.

It may be true, as the Government suggests, that had the beneficiation plant been located at Little Rock, rather than at the mine site, it could not be fairly said that it was a part of the mine or covered by the Miners' Lien Statute. But the case postulated by the Government is not the case before us. The device of supposing an extreme case in order to demonstrate the unsoundness of a legal proposition is a helpful one in many instances, but it does not afford a safe guide for decision in all cases. While the parties might have agreed to construct the plant at Little Rock rather than at Cushman, they did not, in fact, so agree. The statute covers services and materials supplied for use in "equipping" a mine; and it seems to us that the parties here elected to equip the mine proper with a beneficiation plant and the other improvements disclosed by the evidence.

While the case of *Salt Lake Hardware Co. v. Chairman Mining & Electric Co.*, CC, Nev., 137 F. 632, cannot be said to be directly in point here in view of the difference between the statute there involved and that involved here, and in view of the difference in the problem that was before the Court in that case and the one presented here, nevertheless, some of the language contained in the decision is

at least persuasive that the improvements on the Westmoreland properties should be considered as a part of the mine, as we do consider them. In that case the Court said:

> "... It is the duty of the court to consider the object and purpose of the parties in installing the machinery, constructing the mill and improvements on the property, in order to reach a proper interpretation of the law. ... The mechanic's lien law should be so construed as to protect lien claimants of whatever kind, whether contractors, machinists, materialmen, or laborers, in securing their claim. ... It is to secure this end that courts have held that the lien laws should be liberally construed with a view to effect their object and promote justice ..."

"In *Thompson* v. *Wise Boy M. & M. Co.* (Idaho), 74 Pac. 958, 960, where a laborer at work as an amalgamator in a mill situate upon a quartz mine was held to be entitled to a lien on the mine, the court, in its opinion, said:

> "'If it be true that the mill was "affixed to the mine and was a part of the realty", ... then work in the mill was as much work in the mine as operating a hoist would be work in the mine. ... The milling of the ore extracted from the mine is as valuable to the mine owner as the extraction of the ore; and where it is milled upon the mine, and in a mill belonging to the mine, we see no more reason for denying the man a lien who works in the mill than for denying such lien to the man who operates the hoist or runs the cars. ... And we are very strongly inclined to the belief that the Legislature had the one in mind as much as the other when they enacted this law.'

"In *Keystone M. Co.* v. *Gallagher*, 5 Colo. 23, 28, the court said:

> "'Blodgett's claim is for furnishing material for and building a house or shop contiguous to the mine, and built for the use of the mine under the

direction of the mining superintendent. The house was owned by the owners of the mine, and was a part of the mining property, and we see no error in the decree in favor of Blodgett and for the sale of the house, together with the mine, for the purpose of enforcing the lien.'

"In *Williams* v. *Mountaineer G. M. Co.*, 102 Cal. 134, 142, 34 Pac. 702, 36 Pac. 388, it was held, under the lien law of California, that a claim of lien for materials furnished for the construction of a mill, tramway, boarding house, and reduction works upon a mining claim should be against the mining claim, and not the specific structure upon the mine. In the course of the opinion, the court said:

"'The mill is not a mere appurtenance for the mine. It is upon the mining claim, and, like the tunnels, tramways, and roads, is a part of the mine.'

"In *Gould* v. *Wise*, 18 Nev. 253, 264, 3 Pac. 30, 35, the court said:

"'The last point made is that there was no testimony showing how much of the land upon which the reduction works stood was necessary for its convenient use and occupation. When the reduction works were leased, the land determined by the Court as subject to the lien was embraced within the demised premises. And when the defendant acquired the property he purchased this land and the reduction works. This testimony showing that the land and reduction works had been leased together and sold together, tends to prove that the property subject to the liens has been treated as a unit, and used for a common purpose.'

"In view of the principles announced in these cases, and of all the facts established by the testimony, that the mill in question was erected upon the mining ground owned by the defendant; that the object in view was the erection and construction of the mill for the purpose of working the ores that were to be extracted from the group of mines de-

scribed in the lien; that the success and usefulness of the mill and of the mine were virtually dependent upon each other, and to that extent, at least, they were bound together for a common purpose—my conclusion is that the entire group of mines as mentioned in the lien and complaint should be held subject to the lien" (137 F. at 641-643).

Further support for our view is found in 58 C. J. S. "Mines & Minerals", Section 1(d), pp 16-17, wherein it is said: "As ordinarily used, the term 'mine' includes the bed or vein of ore into which the pit enters, ... and the whole series of shafts and subterranean passages and chambers connected with it, and also includes all parts of the property of the *mining plant*, on the surface or underground; which contribute, *under one management*, to the mining, and is not limited to mere subterranean excavations or workings." (Emphasis supplied.) The beneficiation plant and the other improvements were all located on lands which Westmoreland purchased with funds advanced by the Government and were certainly a part of Westmoreland's "mining plant", and all of the project was under one management.

Having determined that the improvements on the Westmoreland properties, as well as the ore bearing lands themselves, are covered by the Miners' Lien Statute, we reach the question of priority as between the miners' liens and the Government's mortgages. It will be recalled that in *Roberts* v. *Tice*, *supra*, the Court said, "... If laborers and materialmen perform labor and furnish material to improvement a leasehold already covered by a mortgage or other encumbrance, their right to a lien on the improvements is paramount, but not so to the leasehold." Were it not for the "after acquired property"* clauses contained in the Government's mortgages, there would be no question that, under the holding in the case last cited, the lien claimants would be entitled to priority as to the im-

* In the phrase "after acquired property clauses" we include Paragraphs A and B of Section I of the supplemental mortgage.

provements. The Government contends, however, that by virtue of the after acquired property clauses the improvements placed upon the properties were covered by the liens of its mortgagees, and that such liens related back to the date of the mortgages so as to give it priority. The Government's position in this connection is stated in its final brief, as follows: "The only question of any consequence is whether a mortgage of 'after-acquired' property specifically covers such after-acquired property and is entitled to the same protection as a mortgage of properties already in existence and owned by the mortgagor at the date of the execution thereof. The Government contends that property is as much 'specifically covered' within the meaning of the *Tice* case under an after-acquired mortgage clause as where said property is identified as presently existing property owned by the mortgagor." (Government's Final Brief, page 44.)

There can be no question that, as a general rule, in case of mortgages containing after acquired property clauses the liens of such mortgages attach to after acquired property at the time that title thereto vests in the mortgagor; where, however, if the property at the time it comes into the possession or ownership of the mortgagor is burdened with a mechanics' or miners' lien, that lien takes priority over the mortgage lien, although actually subsequent thereto in point of time. 36 Am. Jur. "Mechanics' Liens", Section 181, page 122; 57 C. J. S., "Mechanics' Liens", Section 201, page 759. Therefore, if the Government's mortgage liens and the miners' liens came into existence at the same time, the latter would take precedence over the former under the authorities just cited. *Oil, Bear Lake and River Water Works and Irrigation Co. v. Garland, et al.*, 164 U. S. 1, 19-24.

In resisting the application of the foregoing principle to the instant case, the Government has advanced a number of what appear to us to be highly technical arguments, but has failed to cite any authority to sustain the same. In view of the liberal construction to be given to the Miners' lien statute we do not believe that the rights of the parties should depend upon highly technical considerations or

upon any finely drawn distinctions. Not only is the Miners' Lien Statute to be liberally construed, but it should be given a practical construction, and one which will do justice as between the parties and prevent unjust enrichment. After all, it must be kept in mind that but for the services and materials supplied by the lien claimants, and others, there would be no improvements upon the property.

The Government first contends that its liens, by virtue of the after acquired property clauses, related back to the time that the mortgages were filed, whereas, as it contends, the liens of the suppliers had their inception at the time that their materials were delivered at the site. We are not so sure that a mortgagee's lien on after acquired property relates back to the time of the recordation of the mortgage; we have found no authority to that effect, and, on the contrary, in 59 C. J. S. "Mortgages", Section 185 (b), page 241, it is said that the lien of a mortgage can attach after acquired property only in the condition in which it comes into the mortgagor's hands; in Section 219 of the same Chapter, page 276, it is said that where one executes a mortgage on property, which he does not then own, but to which he subsequently acquires title, the mortgage attaches from the time that title is acquired. Nothing is said about "relation back" in either section. Assuming, however, that there is such a "relation back", the same is a fiction and should not be indulged in so as to defeat the rights of suppliers who furnished the very materials to which the mortgagee's liens attached. As was said in the *Bear Lake case, supra*, "... the actual fact will be considered and not the fiction" (164 U. S. at 231).

It is next contended that when Westmoreland acquired title to the materials furnished by the suppliers, the Government's mortgage liens became perfected, whereas the liens of the suppliers were inchoate until such later time as the latter took the statutory steps to perfect such liens. The priority of a mechanic's lien under Arkansas law, however, does not depend upon the quality of the lien as "choate" or "inchoate", but rather upon the time at which the lien attaches, which is when the first materials are furnished. See *Frank v. Wood*, 21 Ark. 10, 13-14.

The Government suggests that title to the materials supplied by the lien claimants vested in Westmoreland or in it* prior to the time that such materials were delivered to the Westmoreland properties, and for that reason the mortgage liens attached prior to the inception of the miners' liens; we do not agree. In the first place, we are not satisfied that the lien of a materialman under Ark. Stats. Section 51-701 does not arise until actual delivery at the mine site. In *Estep* v. *Blue Ribbon Coal Co., supra*, 177 Ark. at 86, it was said that the statutory lien for materials could not have its inception "before the material and supplies were begun to be furnished"; nothing is said about delivery at the mine site; at a matter of fact, the Court was apparently not there concerned with the claims of materialmen at all, but solely with labor claims; it would seem reasonable that the materialmen here "furnished" Westmoreland with the materials when they delivered the same to Westmoreland; clearly, the materials were furnished for use in constructing the improvements. In *Superior Oil Co.* v. *Etheridge, supra*, 219 Ark. at 297, fn. 6, the Court said: "When we say 'pipe on the drill site', we do not refer to some casing that was never unloaded on the drill site. Pipe in transit and never on the drill site was not subject to the lien; . . ." As the Government points out in another connection, however, the Court in the Etheridge case was not concerned with priorities; and, furthermore, the pipe referred to in the footnote which has been quoted was never delivered on the lease; here, all of the materials were delivered. But aside from that, and granting the Government's premises as to the time of inception of the miners' liens, we feel that to allow the Government's conclusion as to priority would be to take a hyper technical view of the statute that would be contrary to its beneficial intent and purpose, and we are unwilling to do so.

With particular regard to Latrobe Construction Company, which supplied labor for the construction of the

* Ark. Stats. Section 51-1006 provides that in the absence of a stipulation to the contrary, the mortgagee of personal property shall have the legal title thereto and the right to possession

plant, and with regard to Bragg's Electric Construction Company to the extent that it supplied labor, as opposed to materials, the Government argues that at the time their work was done, the Government's liens had already attached to the improvements and materials upon which they worked, and that, regardless of the priority accorded to the other lien claims, their particular claims should be denied priority. This attempted distinction between Latrobe and Bragg's, on the one hand, and the other lien claimants, on the other, is so highly technical and, to our mind, so inequitable and without basis in reason that we are unwilling to draw it.

Nor do we attach significance to the fact that under the provisions of Ark. Stats., Section 51-1006, the "legal title" to the materials furnished may have been in the Government, rather than in Westmoreland. Such title was in the Government, if at all, only for security purposes; the property was actually sold to Westmoreland, and it was Westmoreland's property, subject to the liens of the Government.

It is still further argued by the Government that in no event should the lien of a particular claimant be extended beyond "the particular part of the building or structure on which he worked or upon the particular part of such building created out of the materials supplied by said lien claimant", (Government's Final Brief, page 47); in the alternative it is urged that if it be held that a lien claimant's lien extends to the entire building on which he worked or for which he supplied materials, such lien could not apply to any other buildings or structures erected "prior to the date of the commencement of said claimant's lien", (Ibid., pp. 47-48). As stated, no authority is cited in support of those contentions, and we reject them.

It must be remembered that the statute now under discussion must be given a practical construction, and to try to draw all of the distinctions suggested by the Government in the arguments just mentioned would be highly impractical and would render the statute unworkable in a case of this magnitude. Those arguments ignore the fact that

all of the improvements with which we are here concerned were constructed as part of one integrated project, and we feel that all of those structures should be regarded as a unit for the purpose of determining priority. Of course, when the question of sale arises, it will be obviously desirable to sell the individual improvements separately.

The Government further argues that the lien of any supplies of materials incorporated into the real estate should be held to be prior to the Government's mortgage on the land only if the property could be removed "without injury". We cannot agree with that contention. When the Miners' Lien Statute is read in connection with Section 51-605, it is obvious that it contemplates that the improvements shall be severed and removed from the land, and such land certainly will not be damaged by the removal. Naturally, there are probably certain parts of these improvements, such as concrete foundations, which cannot, from a practical standpoint, be removed and as to such particulars the lien claimants will have no priority. The case, *Imboden* v. *Citizens Bank*, *supra*, referred to by the Government in this connection is not applicable here. In that case the Court was concerned with an extension to an existing improvement which could not be removed therefrom without damage thereto. We do not understand that any of the improvements involved in this case are connected in any way with any of the improvements that were in existence on the Westmoreland properties at the time of the Government's mortgage. We are here concerned with entirely new construction.

Our determination that the lien claimants are entitled to priority as to improvements constructed by Westmoreland after the date of the Government's mortgages by virtue of the provisions of the Miners' Lien Statute, which is broader than the Mechanics' Lien Statute, actually renders it unnecessary for us to discuss the question of priority as to such improvements under said last mentioned enactment. In the interest of completeness, however, we feel that we should state that it is our opinion that the Government would be entitled to priority under that statute as to such improvements, to the extent of the moneys

advanced for construction purposes, by reason of the proviso contained in Section 51-605, which has been quoted. It should be noted that in determining the Government's priority as to improvements under the mechanics' lien law we do not extend that priority to the $418,600 which the Government advanced for land purchase, but limit it to the amount advanced for construction purposes; the propriety of this course was suggested in the Government's final brief. Of course, the Government has priority with respect to the $418,600 advance under the prior mortgage provision of the Mechanics' Lien Statute, as far as the land itself is concerned. This view of the matter eliminates any necessity of a lengthy and detailed consideration of the several opinions rendered in the case of *Ashdown Hardware Co.* v. *Hughes*, *supra*, and of any effort on our part to reconcile the divergent views expressed in that case.

In determining how much of the Government's claim should be allowed priority with respect to the improvements on the property, we accept the testimony of Mr. E. H. Moore, who was Chief Accountant for Westmoreland; Mr. Moore no longer has any connection with Westmoreland or with any of the creditors; he was not cross-examined, nor was his testimony contradicted. Mr. Moore testified from a flow sheet that he had prepared showing conditions as they existed on March 31, 1953. While he did not testify as to how much money the Government had "advanced" for the construction purposes, he did testify as to expenditures that Westmoreland had made which we consider to be properly allocable to construction. He stated that $95,000 had been expended as fees for the engineering firm employed by Westmoreland to supervise the work; that $956,676.47 had been spent for building the washing and concentrating plant shown in Category No. 2 on the flow sheet; that out of an item of $40,835.31, appearing on the flow sheet as "Freight and Erection", roughly $17,700 represented freight on mining and hauling equipment, leaving a balance of $23,135.31 allocable to freight on material and supplies used in construction; that $313.65 was spent for building a certain road or for engineering services in connection with said road, and that $407.61 was

spent for the construction of a movable field office for the mining superintendent. His figures for construction total $1,075,533.04. In its final brief the Government states that $1,122,531.48 was "advanced" by the Government for construction purposes, and that $1,072,404.81 was actually "expended" for that purpose. It will thus be seen that there is a very close correlation between the Government's figures on actual construction expenditures and those testified to by Mr. Moore, the difference being only $3,128.23, which difference under the circumstances presented here we deem to be immaterial. Now, it is true that the Government's priority under Section 51-605 is to be determined by the amount of money which it advanced for construction purposes, rather than by the amount that Westmoreland spent for such purposes; but the difference between what the Government says was advanced and what Mr. Moore said was spent is only $46,998.44, a comparatively small figure in this lawsuit; and it must be remembered that pursuant to Amendment No. 1 to the original contract the Government recouped from Westmoreland's bank account the sum of $119,230.31. We feel, therefore, that substantial justice would be done by a determination that the Government's priority under Section 51-605 with respect to the improvements would amount to the $1,075,533.04 testified to by Mr. Moore.

As to the personal property furnished by several of the lien claimants and not incorporated into the work, we are satisfied that each of such claimants is entitled by virtue of the Miners' Lien Statute to a lien superior to those of the Government on such personal property as he himself furnished, but not as to the personal property furnished by others. *Bennett* v. *Weis*, *supra*. With respect to personal property not incorporated into the improvements and not furnished by any of the lien claimants, we hold that none of those claimants has any lien whatever upon such property under either the Mechanics' Lien Statute or the Miners' Lien Statute.

This brings us to a consideration of the prayer of the judgment creditors for leave to levy executions upon certain of the automotive equipment, belonging to West-

moreland and described in the respective answers of those creditors, which levy, if permitted, they contend will entitle them to the benefits of Section 60 of Act 142 of 1949 (Ark. Stats., Section 75-160), and will give them execution liens on such vehicles superior to the mortgage liens of the Government.

Act 142 of 1949 is the Arkansas version of the "Uniform Motor-Vehicle Administration, Certificate of Title and Antitheft Act"; it is a comprehensive statute, consisting of ninety-four sections, grouped into twelve separate articles. Subsection (a) of Section 60 of said Act provides that: "No conditional sale contract, chattel mortgage, or other lien or encumbrance or title retention instrument upon a registered vehicle, other than a lien dependent upon possession, is valid as against creditors of an owner acquiring a lien by levy or attachment or subsequent purchasers or encumbrances with or without notice until the requirements of this article have been complied with." It is further provided that a certified copy of a title retaining contract or lien instrument affecting a vehicle covered by the Act shall be filed with the Arkansas State Revenue Commissioner, and that the existence of such lien shall be noted on the title certificate; and, further, that the Commissioner shall maintain an appropriate index of all lien, encumbrance or title retaining instruments filed with him. Act 142 of 1949, Sections 60 (b) (d) (e) (f) Section 61 of the Act provides that the filing of a certified copy of a lien instrument, and the issuance of a new title certificate evidencing such lien shall be constructive notice of all liens and encumbrances against the vehicle in question, as far as creditors of the owner and subsequent purchasers or encumbrancers, except those holding liens dependent upon possession, are concerned; and further provides that such method of giving notice of such liens or encumbrances shall be exclusive. It has been stipulated in the instant case that the Government has never filed, or caused to be field, copies of its original mortgage or of its supplemental mortgage with the Arkansas State Revenue Department.

It is the theory of the judgment creditors that Act 152 is applicable to the vehicles described in their respective answers, and that there was no compliance by the Government or Westmoreland with the requirements of Section 60 of said Act; that they obtained their several judgments, and in due course would have had executions issued and levied upon said vehicles, but that they were prevented from doing so by the fact that on January 22, 1954, we appointed a receiver to take charge of the assets of Westmoreland and to preserve them pendente lite; they contend that had such writs been issued and levies made, they would have become entitled to the benefits of Section 60(a) of Act 142, and that their execution liens would have been superior to the Government's mortgage liens. As indicated, they now ask us to permit them to have executions levied on said vehicles, notwithstanding the receivership.

In answer to those contentions, the Government takes the position that the permission sought by the judgment creditors should not be granted; and it argues further that even if we should grant said prayer and permit levies on the equipment in question, the execution liens would still be inferior to the Government's mortgage liens.

In taking up the respective contentions just mentioned it should be borne in mind that we are not here concerned with any question of the relative priorities of existing liens, as far as the judgment creditors are concerned. None of those creditors contends that at the present time he has any lien on any of Westmoreland's vehicles which is superior to the liens held by the Government. What said creditors are asking us to do is to permit them, after the Government commenced action to foreclose its mortgages, unquestionably good as between the parties thereto, to obtain liens on the vehicles in question by levy of execution thereon, and then to hold that the liens so obtained are superior to those of the Government. In other words they are now seeking to employ, subsequent to the commencement of this action, legal process and remedies so as to improve the position occupied by them at the time

the suit was filed. We do not think that this should be allowed.

In the early Arkansas case of *Hornor* v. *Hanks*, 22 Ark. 572, Hanks brought an action for the partition of certain lands; Russell, a defendant, had previously obtained a judgment against Hanks in federal court, and after the commencement of the partition suit, obtained a sale of the lands involved under an execution based upon his federal court judgment; Russell bid in the lands at the sale and attempted to set up the title thereby obtained as a bar to Hanks' action for partition. In holding that this could not be done the Court said:

> "The law is expressly written that the right of a plaintiff must be adjudicated upon as it existed at the time of the filing of his bill. . . . And this court has decided that where a bill disclosed a good cause of action but which had not accrued when the bill was filed, the bill could not be maintained. *Phebe* v. *Quillin*, 21 Ark. 499. And it would seem to be against the policy of a court of chancery to allow a defendant to cut off, or to modify the relief to which the whole case may show the plaintiff to have been entitled upon the condition of the case when the suit was begun, by the use of legal process or remedies after the defendant is brought into a court of equity, there to make his defense. For the object of a chancery suit is to administer entire justice, by a settlement of the whole controversy between all the persons affected by it, and this it can do only by engrossing the consideration of all the points of prosecution and defense that may be allowed to the respective parties. Hence Russell would have done well to have defended the bill of Hanks upon its deficiencies, and his own rights, as they were when the bill and his answer were filed. He could not, of course, have been deprived of any benefit that might attach to his levy of the lands made before the beginning of this suit; neither, on the other hand, does it follow that his execution sale against Hanks can assist his defense here . . ." (22 Ark. at 580-581).

Horner v. *Hanks* has been cited with approval in a number of later Arkansas cases, the most recent being *Massey* v. *Tyra*, 217 Ark. 970.

We have examined the cases cited by the judgment creditors on this phase of the case; and while they recognize the propriety in certain instances of permitting a levy of execution on property in the hands of a receiver, none of them goes so far as the judgment creditors would have us go here. As a matter of fact in *Coe* v. *Columbus, Piqua & Indiana R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518, 540-543, cited by the judgment creditors, the court considered a levy of execution on behalf of a judgment creditor upon property in the hands of a receiver to be good against the debtor, but not as against a mortgagee, even though the mortgage was defectively acknowledged; the view was taken that the mortgage was good as between the parties, and that a court of equity would have directed that it be perfected. It was said: "There was, then, a *lis pendens* which a subsequent claim could not defeat." The Court also took the position that the possession of the receiver was, in effect, the possession of the mortgagee. As we have said, the Government's mortgages were unquestionably good as between the parties, as far as the motor vehicles were concerned, and there is no more reason to permit the judgment creditors to perfect their liens on such vehicles so as to gain priority with respect thereto than there is to permit the Government to comply, or force Westmoreland to comply, with Act 142 of 1949, assuming that said statute is applicable here.

But aside from the foregoing, it seems to us that in view of the relief sought by the judgment creditors, the burden is upon them to establish the applicability to this case of Act 142, and, if that statute be applicable, then to further establish that we should, in the exercise of our discretion, permit the levies to be made.* And we feel

* With regard to the case of West v. General Contract Purchase Corporation, 221 Ark. 33, discussed in the briefs, it should be said that in that case the Court was called upon to determine the relative priority of a conditional sale contract and a valid and existing execution lien on a vehicle that had actually been seized by the sheriff;

that said creditors have failed to discharge their burden in both of the respects just mentioned.

Assuming for the moment that the several vehicles described in the answers of the judgment creditors are such as would normally be "subject to registration" under Act 142, a reading of Section 60(a) of said Act discloses that it does not apply to vehicles that are merely "subject to registration" but only to such vehicles as are actually "registered" under the Act. While the Act does not require that certificates of title be renewed annually, certificates of registration must be so renewed, (Act 142 of 1949, Sections 40-44); hence, a motor vehicle may be registered at one time and not registered at another time. As we construe Section 60(a), in order for a judgment creditor to obtain the benefit thereof, as against a mortgage, it must appear that the vehicle in question was, in fact, registered at the time such creditors obtained a levy of execution thereon. In the instant case there is no evidence that any of the vehicles in question are registered now, or that they were so registered when the suit was filed, or when the receiver was appointed, or when the judgment creditors filed their answers containing the prayers for relief which is now under discussion.

It is true that counsel for the Government state in their brief that, "The receiver in this case has registered those vehicles which the law requires him to register ..." (Government's Final Brief, p. 33). But such vehicles are not identified in any manner, and we have no means whereby we can identify them. It is also true that Mr. E. H. Moore, to whom we have previously referred, identified certain expenditures of Westmoreland as representing license fees on some of its automotive equipment; it appears, however, that those expenditures were made in

---

and it was held in such case that the conditional vendor was required to show that it had complied with Act 142 of 1949. In the instant case, however, the judgment creditors have no liens on the Westmoreland's motor vehicles; they are asking us to permit them to acquire liens and then to award priority to the same; and under such circumstances, as stated, we feel that the burden is upon them to show that they are entitled to such relief.

July and August of 1952, whereas this suit was not commenced until January, 1954; and, of course, we cannot from Mr. Moore's testimony identify the particular vehicles upon which license fees were paid.

Not only have the judgment creditors failed to show that such vehicles are now registered under the Act or were so registered at any other particular time, but, on the other hand, the record in the case and the evidence that we have heard has shown that at all times pertinent hereto at least the great majority of such vehicles was not even "subject to registration". A motor vehicle is not required to be registered unless it is actually "driven or moved upon a highway", Act 142 of 1949, Section 32; and even if it be conceded that all of the vehicles described in the answers of the judgment creditors were adapted for operation on highways and that such was their contemplated use, the fact remains that after the execution of Amendment No. 1 to the original contract, which occurred on April 2, 1953, operations at the Westmoreland project were closed down and the equipment taken out of use. Since the filing of the suit, it seems clear that none of hte vehicles has been driven upon the highways with the possible exception of one or two that may have been used from time to time by the receiver; but, as stated, such vehicles are not identifiable from the evidence. It is also clear that for a number of months prior to the commencement of this action, the vehicles were, by and large, out of use.

Even if we were convinced, however, that Act 142 is applicable here, still the judgment creditors in our estimation have failed to establish that we should permit them to levy executions on the automotive equipment. We have already considered and rejected the "equitable contentions" advanced by the creditors in general, and we see no particular equities in favor of the judgment creditors which would move us to grant them the relief that they seek. On the contrary, we think that the equities are the other way.

The creditors who obtained their judgments prior to the filing of this suit apparently relied upon the liens of their judgments upon the Westmoreland real estate, and took no action toward obtaining liens on the personalty until after the Government had filed its suit to foreclose its liens, and had had the property seized by a receiver appointed by this court. The receiver has had this property in his possession for months, caring for and guarding the same, and expending substantial sums of money upon it, particularly upon the motorized equipment, all at the Government's expense, or at least with moneys advanced by the Government, which moneys it will, in all probability, never recover.

Equity favors the diligent and not those who sleep on their rights; the creditors who obtained judgments prior to the filing of this suit had ample time to have writs of execution issued and levied, but they failed to do so. The creditors who did not obtain their judgments until after this suit was filed have been, in our eyes, even more dilatory and stand on a less favorable footing from an equitable standpoint than those who at least reduced their claims to judgment before the insfitution of this action.

Under the circumstances revealed here, we would deem it most inequitable to give the judgment creditors the relief they seek. None of their money went into this equipment nor did they supply any of it; on the other hand, said equipment, with the exception of the jeep that has been mentioned, was bought and paid for with funds advanced by the Government, and the jeep itself was part of the security upon which the Government relied, and was specifically described in the original mortgage. Moreover, there is no showing here that any of the judgment creditors searched the records of the Arkansas State Revenue Department prior to extending credit to Westmoreland, or that any of them actually relied upon the fact that Act 142 had not been complied with. We, accordingly, decline to permit them at this time to levy execution on the automotive equipment; that means that, as far as personalty is concerned, they will be treated simply as unsecured creditors. Of course, their judgments are liens on the

Westmoreland lands located in Independence County, and are also liens on such lands located in Izard County to the extent that said judgments are docketed in that country; but said liens are inferior to those of the Government and to those of the lien claimants.

To summarize, we hold that the mortgage liens of the Government are superior to the claims of all creditors, as far as the lands of Westmoreland and the improvements existing thereon as of the date of the Government's mortgages are concerned; this priority as to this category of property extends to the full amount of the Government's claim for which it is entitled to judgment against Westmoreland. Next in order come the miners' liens of the lien claimants; third in line are the liens of the judgment creditors to the extent that their judgments are liens. At the bottom of the order of priority are the claims of the unsecured creditors.

As to the improvements erected upon the Westmoreland lands subsequent to the Government's mortgages, and which have become appurtenant to the land, the claims of the lien holders under the Miners' Lien Statute are entitled to priority over the mortgage liens of the Government and the judgment liens, which latter two classes of liens take priority, as between themselves, in the order mentioned. Finally come the claims of the unsecured creditors, which, when reduced to judgment, will, as a class, constitute fourth liens on the Westmoreland lands and improvements thereon.

As to particular items of personal property furnished by particular lien claimants, which have not been incorporated into the improvements so as to become appurtenant to the land, and which are identifiable, the individual lien claimants furnishing such items are entitled to priority with respect thereto under the Miners' Lien Statute, as against the Government, the mortgage liens of which will be second liens as to such items. No lien claimant, however, is entitled to any lien on any item of personal property not furnished by him.

As to items of personal property not furnished by any of the lien claimants and which have not been incorporated into the improvements so as to become appurtenant to the land, the Government's mortgage liens are superior to all of the other claims.

A foreclosure sale of all of the Westmoreland properties will be decreed, and the proceeds of such sale will be distributed in accordance with the relative priorities heretofore declared. Before concluding this memorandum we will comment briefly on the question of how this property should be sold:

It goes without saying that the properties should be sold in such a manner as to produce the highest possible return and so as to protect, insofar as possible, the legitimate rights and interest of the several classes of creditors, although from a practical standpoint it must be recognized that it is practically inevitable that both the Government and the lien claimants will sustain severe loss, and the probabilities are, to put it mildly, that the judgment creditors now existing, and the unsecured creditors who will become judgment creditors as a result of the instant proceedings will probably realize nothing from the sale. Moreover, since the Government has liens on items of personal property with respect to which none of the creditors have any lien claims, it seems equitable that Westmoreland's assets be, in effect, marshalled.

To achieve the results just mentioned, insofar as they can be achieved, we feel that there should first be sold the personal property upon which the Government has liens but with respect to which the other creditors have none. In view of the nature of this property, consisting principally of mining and hauling equipment, it should be sold item by item, and a record made of the amount for which each item is struck off. We include in this category the automotive equipment that has been discussed; with particular regard to the Euclid dump trucks, however, should any bidder manifest an interest in bidding for those vehicles as a group, they should be offered on that basis after they have first been offered one by one, and the bid

or bids should be accepted which will produce the highest return. The proceeds of the sale of such personal property should be credited against the amount of the Government's claim.

There should next be offered the identifiable personal property furnished by particular lien claimants, each lot being offered separately. The proceeds of the sale of each lot should be credited against the claim of the particular supplier who furnished such property.

Thereafter the improvements on the Westmoreland properties, constructed subsequent to the execution of the Government's mortgages, should be sold, each improvement being offered separately. The proceeds derived from the sale of the improvements should be credited upon the judgments of the respective lien claimants, all of them sharing *pro rata*. The purchaser or purchasers of the improvements will have the right to remove the same, or such portions thereof as are removable, within a reasonable time after confirmation, and we feel that six months would be a reasonable time. In the unlikely event that the proceeds of the sale of the improvements are more than enough to satisfy the judgments of the lien claimants, the balance should be credited against the Government's judgment.

Finally, the lands and improvements thereon existing at the time of the Government's mortgages should be sold, and the proceeds of such sale credited against the Government's judgment. Should such proceeds be more than sufficient to liquidate the Government's claim in full, together with all costs, then the overplus should be applied in accordance with the order of priority heretofore established.

Let a decree be entered in accordance with this memorandum and in accordance with the memorandum heretofore filed dealing with the controversy between the Government and Westmoreland. We feel that this decree should be drafted by the United States Attorney after full consultation, or consultations, with the receiver, who is thoroughly familiar with the properties involved, and who

will be appointed as special master to make the sale of such properties. After the degree has been drafted, it should be promptly presented to the Court for approval. We feel that ten days from this date should be sufficient to enable the United States Attorney to draft and present the decree, in view of the fact that the receiver has prepared a comprehensive inventory of the property involved.

This the 23rd day of September, 1955.

/s/ HARRY J. LEMLEY
United States District Judge

DECREE

(Filed in U. S. District Court on October 25, 1955)

I

This cause having been tried to the Court, and the Court having heretofore filed herein a "Statement of the Court" on June 30, 1955, and a "Memorandum" of the Court on the 1st day of August 1955, in which Statement and Memorandum the Court set forth its Findings of Fact and Conclusions of Law relating to the issues existing between the plaintiff, United States of America, and the defendant, Westmoreland Manganese Corporation, and the Court having also filed herein a "Memorandum Opinion Relative to Priority of Creditors' Claims" on September 24, 1955, in which said last-mentioned Memorandum the Court did set forth its Findings of Fact and Conclusions of Law relating to the issues existing between and among the parties hereto other than the defendant, Westmoreland Manganese Corporation, and the Court being well and sufficiently advised in the premises,

IT IS HEREBY CONSIDERED, ORDERED, AND ADJUDGED that the following parties have judgments against the defendand, Westmoreland Manganese Corporation, in the following amounts, to-wit:

A. In favor of the United States of America in the amount of $3,243,474.75, representing a principal indebtedness of $2,877,006.50, together with interest

on said principal sum until the date of this Decree, said interest being in the amount of $366,468.25.

B. In favor of the Arkansas Foundry Company in the amount of $48,858.65, with interest 6 percent per annum from March 24, 1953, until the date of this Decree.

C. In favor of Mill and Mine Supply Company in the principal amount of $8,312.69, with interest at the rate of 6 percent per annum from April 24, 1953, until the date of this Decree.

D. In favor of Crow-Burlingame Company in the amount of $4,297.32, with interest at the rate of 6 percent per annum from March 10, 1953, to the date of this Decree.

E. In favor of Latrobe Construction Company in the amount of $157,712.54, representing a principal indebtedness of $137,580.00 plus interest at the rate of 6 percent per annum from the date of the filing of its lien to the date of this Decree, said interest being in the amount of $20,132.54.

F. In favor of General Steel Products Company in the amount of $17,533.67, representing a principal indebtedness of $15,335.62 plus interest at the rate of 6 percent per annum from the date of the filing of its lien to the date of this Decree, said interest being in the amount of $2,198.05.

G. In favor of Jeffery Lumber Company in the amount of $2,475.79, representing a principal indebtedness of $2,157.55 plus interest at the rate of 6 percent per annum from the date of the filing of its lien until the date of this Decree, said interest being in the amount of $318.24.

H. In favor of Padgett Lumber Company in the amount of $4,445.99, representing a principal indebtedness of $3,866.20 plus interest at the rate of 6 percent per annum from the date of the filing of its lien until the date of this Decree, said interest being in the amount of $579.79.

I. In favor of Choctaw, Inc., in the amount of $3,452.99, representing a principal indebtedness of $3,086.29 plus interest at the rate of 6 percent per annum from the date of the filing of its lien until the date of this Decree, said interest being in the amount of $366.30.

J. In favor of Ira Sherrill in the amount of $416.37, representing a principal indebtedness of $362.50 plus interest at the rate of 6 percent per annum from the date of the filing of this lien until the date of this Decree, said interest being in the amount of $53.87.

K. In favor of Bragg's Electric Construction Company in the amount of $17,962.50, representing a principal indebtedness of $15,700.13 plus interest at the rate of 6 percent per annum from June 2, 1953, the date of the filing of its lien, to the date of this Decree, said interest being in the amount of $2,262.37.

L. In favor of Crane Company in the amount of $1,346.68.

M. In favor of B. F. Goodrich Company in the amount of $2,300.79.

N. In favor of White River Distributors, Inc., in the amount of $5,457.32.

O. In favor of White River Oil Company, Inc., in the amount of $54.29.

P. In favor of Batesville Equipment Company in the amount of $4,063.87.

Q. In favor of Industrial Electric and Supply Company in the amount of $3,078.62.

R. In favor of The Todd Company, Inc., in the amount of $854.31.

S. In favor of the Cummins-Diesel Company in the amount of $912.16.

It is further ordered and adjudged that the above-named parties have judgment for their respective costs.

expended herein. All of the said judgments rendered above shall bear interest at the rate of 6 percent per annum from the date of this Decree until paid.

II

A. The judgment of the plaintiff, United States of America, hereinabove rendered, is hereby ordered and decreed to constitute a first, prior, and paramount lien upon the following-described real property and interests therein located in Independence County and Izard County, Arkansas, together with all improvements existing thereon as of May 22, 1952, which improvements constitute all of the improvements on said real properties not hereinafter described and included under paragraph III below, to-wit:

(Descriptions of land omitted)

together with all and singular the tenaments, hereditaments and appurtenances belonging or in anywise appertaining to the premises above-described in 1 and 2, or any part thereof, as of May 22, 1952, and all reversions, remainders, revennes, rents, issues and profits thereof (including in the foregoing but not limited to all buildings, manufacturing plants, railroad sidings, improvements and fixtures located in, on or about said premises on May 22, 1952; all easements, rights of way, licenses and privileges to said premises belonging or in anywise appertaining, owned by the Westmoreland Manganese Corporation on May 22, 1952; and all the estate, rights, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, owned by the said Westmoreland Manganese Corporation on May 22, 1952, of, in and to said premises, property and rights and each and every part of the same, with the appurtenances), subject, however, to any and all existing easements, rights of ways, restrictive covenants, licenses, reservations of record, and grants for highway purposes.

(Descriptions of lands in which Westmoreland had mineral interests are omitted)

B. The judgments of the following parties defendant are hereby adjudged and decreed to constitute second liens upon the real property and improvements thereon described

in subparagraph A of this paragraph II of equal dignity, and said parties shall participate *pro rata*, according to the amounts of their respective judgments, in the surplusage from the sale of said lands and interest in real property, over and above the amount neccessary to satisfy the judgment of the United States of America, if there be any such surplusage, as hereinafter ordered and decreed, to-wit:

1. Latrobe Construction Company.
2. General Steel Products Company.
3. Jeffery Lumber Company.
4. Padgett Lumber Company.
5. Choctaw, Inc.
6. Ira Sherrill.
7. Bragg's Electric Construction Company.
8. Arkansas Foundry Company.
9. Mill and Mine Supply Company.
10. Crow-Burlingame Company.

C. The following parties shall participate in the surplusage from the sale of those lands and interests in real property described in subparagraph A of this paragraph II which are located in Independence County, Arkansas (but not in the proceeds of the sale of any lands located in any other county), over and above the amounts necessary to satisfy, first, the judgment of the United States of America and, second, judgments of the ten parties defendant named in subparagraph B of this paragraph II, if there be any such surplusage, in the following order:

1. State of Arkansas, assessment filed September 14, 1953, $279.98.

2. The following State judgments are of equal dignity:

a. Continental Gin Company, judgment obtained October 26, 1953, $40,727.76.

b. Koppers Company, Inc., judgment obtained October 26, 1953, $434.22.

c. Transall, Inc., judgment obtained October 26, 1953, $4,499.06.

d. Trans-World Airlines, Inc., judgment obtained October 26, 1953, $738.81.

e. Westinghouse Electric Supply Company, judgment obtained October 26, 1953, $1,784.03.

3. Gardiner-Denver Company, judgment obtained October 27, 1953, $458.00.

4. Central Scientific Company, judgment obtained December 18, 1953, $182.31.

5. The following State judgments are of equal dignity:

a. Carnegie Institute of Technology, judgment obtained March 4, 1954, $483.75.

b. Firestone Tire and Rubber Company, judgment obtained March 4, 1954, $6,392.99.

c. Batesville Truck Lines, Inc., judgment obtained March 4, 1954, $1,433.42.

d. Donley Pipe and Supply Company, judgment obtained March 4, 1954, $944.58.

e. Fisher's Scientific Company, judgment obtained March 4, 1954, $5,376.65.

6. The following State judgments are of equal dignity:

a. Bituminous Casualty Corporation, judgment obtained April 5, 1954, $6,830.92.

b. Clark Equipment Company, judgment obtained April 5, 1954, $5,458.14.

7. State of Arkansas, assessment filed August 16, 1954, $53.13.

8. Southwestern Bell Telephone Company, $925.38.

D. The following parties defendant and intervenors shall participate *pro rata*, according to the amounts of their judgments, in the surplusage from the sale of said lands and real properties described in subparagraph A of this paragraph II after the satisfaction of all prior claims

as hereinabove set forth in subparagraphs A, B, and C of this paragraph II, to-wit:

1. Crane Company.
2. B. F. Goodrich Company.
3. White River Distributors, Inc.
4. White River Oil Company, Inc.
5. Batesville Equipment Company.
6. Cummins-Diesel Sales Corporation.
7. The Todd Company.
8. Industrial Electric and Supply Company.

III

A. The judgments hereinabove rendered in favor of Latrobe Construction Company, Bragg's Electric Construction Company, Arkansas Foundry, General Steel Products Company, Jeffery Lumber Company, Padgett Lumber Company, Choctaw, Inc., Ira Sherrill, Mill and Mine Supply Company, and Crow-Burlingame Company are hereby declared, ordered, and decreed to constitute first and paramount liens of equal dignity upon the following-described improvements made to and upon the properties of the defendant Westmoreland Manganese Corporation after May 22, 1952, to-wit:

The partially completed pumphouse building, the cafeteria building listed as item OWA-309 on the Receiver's inventory, the multi-quonset building listed as item MSA-67 on the Receiver's inventory, and the partially completed processing plant buildings and structures erected or installed on the premises for use in connection with the processing of ore, together with all machinery, equipment, and fixtures installed therein or erected and affixed to the realty for use in connection therewith, all power poles, wiring, and equipment incident thereto erected or installed on the premises after May 22, 1952, all conveyor systems, pipe lines, and flume lines installed or erected on the premises after May 22, 1952, including, without limiting the generality of the foregoing, the property described in the Receiver's inventory under items numbered as follows: E-1 to E-14, inclusive, E-16 to E-104, inclusive, E-109 to E-224, inclusive, the four

unnumbered items on page 8 of Electrical Inventory, the second item on page 9 of Electrical Inventory, WB-1, WB-2, WB-4 to WB-21, inclusive, SS-1 to SS-4, inclusive, HMS-1 to HMS-25, inclusive, OF-199 to OF-205, inclusive, OF-207, OF-208, OF-210 to OF-215, inclusive, PH-1 to PH-5, inclusive, PH-18, PH-19, PH-69, PH-70, S-51, S-240, WA-88, WA-91 to WA-95, inclusive, C-42, C-43, C-44, C-47, C-100, C-101, ME-25, CL-144, CL-157, CL-202, MSA-65, OWA-123, WA-80, that portion of items WA-34 and WA-71 to WA-79, inclusive, that has been erected and installed on the premises. In the case of conveyor systems, items WA-71 to WA-79, inclusive, some of which are not completely erected, the items shall be sold as units and the proceeds prorated to the lien creditors in the proportion that the length of the erected portion bears to the entire length of the conveyor.

and said creditors shall participate in the proceeds of the sale of said properties *pro rata*, in accordance with the amounts of their respective judgments, after first crediting said judgments with the proceeds of the sales of properties upon which they are awardéd liens pursuant to paragraph IV below.

B. The judgment hereinabove rendered in favor of the United States of America is hereby declared, ordered, and decreed to constitute a second lien, subsequent and inferior only to the liens of the creditors enumerated in the last subparagraph hereof, in and to the properties described in said last subparagraph, and the said plaintiff United States of America shall participate in the overplus or surplusage, if any, resulting from the sale of said properties, as hereinafter ordered and decreed.

C. The parties to this action, heretofore enumerated in subparagraph C of this paragraph II above, shall participate in the surplusage from the sale of the annexed improvements hereinabove described in subparagraph A in this paragraph III, over and above the amounts necessary to satisfy, first, judgments of the ten parties named in subparagraph B of paragraph II above, and, second, the judg-

ment of the United States of America, if there be any such surplusage, in the same order of priority as set forth in subparagraph C of paragraph II above.

D. The parties defendant and intervenors, hereinabove enumerated in subparagraph D of paragraph II, shall participate *pro rata*, according to the amounts of their judgments, in the surplusage from the sale of the annexed improvements described in subparagraph A of this paragraph III after the satisfaction of all prior claims as hereinabove set forth in subparagraph A, B, and C of this paragraph III.

IV

A. The judgments of the following parties defendant are hereby declared, adjudged, and decreed to constitute a first, prior, and paramount liens upon the specific items of personal property furnished or supplied by the said individual defendants and more particularly described beneath the respective names of said parties defendant, to-wit:

Mill & Mine Supply Company

Property listed on Receiver's inventory as follows:

Items W-823, W-825, W-1089 to W-1092, inclusive, W-1094, W-1164 to W-1171, inclusive, W-1173 to W-1175, inclusive, S-213 to S-219, inclusive, S-261 to S-267, inclusive, OWA-69 to OWA-87, inclusive, OWA-89, PH-6 to PH-17, inclusive, PH-50 to PH-52, inclusive; OW-160, OW-204, OW-228, OW-276, OW-277, OW-278, OW-279, OW-282.

General Steel Products Company

Property listed on Receiver's inventory as follows:

Items WA-45 to WA-50, inclusive, WA-53 to WA-55, inclusive, WA-69 to WA-70A, inclusive, WA-81 to WA-87, inclusive, OWA-252 to OWA-266, inclusive, OW-90, OW-93 to OW-95, inclusive, OW-240, OW-316, OF-214.

Choctaw, Inc.

Property listed on Receiver's inventory as follows:

Items OWA-101, OWA-102, OWA-103, OWA-104, W-1143.

Crow-Burlinganme Company

Property listed on Receiver's inventory as follows:

Items W-92 to W-98, inclusive, W-105, W-162 to W-164, inclusive, W-169 to W-179, inclusive, W-188, W-195, W-205 to W-247, inclusive, W-252 to W-279, inclusive, W-287, W-288, W-502 to W-749, inclusive, W-768, W-769, W-771 to W-778, inclusive, W-817 to W-819, inclusive, W-1044 to W-1047, inclusive, W-1049 to W-1055, inclusive, W-1077 to W-1079, inclusive, W-1095 to W-1127, inclusive, W-1134, W-1135, W-1139, W-1140, W-1160 to W-1163, inclusive, W-1186, W-1192 to W-1196, inclusive, W-1222, W-1228 to W-1233, inclusive, W-1235 to W-1237, inclusive, W-1239, W-1241 to 1243, inclusive, W-1255 to W-1259, inclusive, W-1266 to W-1269, inclusive, W-1282 to W-1284, inclusive, S-1, S-16 to S-18, inclusive, S-20 to S-23, inclusive, S-25, S-27 to S-35, inclusive, S-41 to S-50, inclusive, S-52 to S-57, inclusive, S-68 to S-75, inclusive, S-105, S-108, S-113 to S-116, inclusive, S-162, S-166, S-168 to S-170, inclusive, S-172, S-175 to S-178, inclusive, S-180 to S-200, inclusive, S-202, S-203, S-204, S-163, S-167.

Arkansas Foundry Company

Property listed on Receiver's inventory as follows:

Items WA-41 to WA-44, inclusive, WA-51, WA-52, WA-58 to WA-68, inclusive, MSA 13 to MSA 17, inclusive, PH-21, PH-22, PH-54 to PH 64-A, inclusive, OW-38, OW-337 to OW-350, inclusive, W-1128, OWA-48 to OWA-56, inclusive, OWA-131 to OWA-251, inclusive, OWA-267 to

OWA-295, inclusive, OW-308 to OW-315, inclusive, OW-317 to OW-322, inclusive.

Jeffery Lumber Company

Property listed on Receiver's inventory as follows:

Items OW-297, OW-303, W-137.

Padgett Lumber Company

Property listed on Receiver's inventory as follows:

Items W-135, W-136, W-1048, W-1058 to W-1060, inclusive, W-1063, W-1141, W-1146 to W-1150, inclusive, W-1152, C-104, OW-25, OW-26, OW-37, OW-105 to OW-108, inclusive, OW-114, WA-2, WA-3, OWA-129, OWA-130, OWA-307, OWA-308.

B. The judgment hereinabove rendered in favor of the United States of America is hereby declared, adjudged, and decreed to constitute a second lien upon all of the properties described in subsection 1 through 7 of subparagraph A of this paragraph IV, subsequent and inferior only to the first lien in favor of the particular party defendant designated in each of said subsections as hereinabove set forth, and the said plaintiff United States of America shall participate in the surplusage or overplus, if any, resulting from the sale of said properties as hereinafter ordered and decreed.

C. The parties defendant and intervenors herein not specifically mentioned in subparagraph A or subparagraph B of this paragraph IV shall participate *pro rata*, according to the amounts of their judgments, in the surplusage from the sale of the properties described in the subsections of subparagraph A of this paragraph IV, if, in fact, there be any surplusage over and above the amounts necessary to satisfy the judgments of, first, the said parties mentioned in the subsections of subparagraph A of this paragraph IV and, then, the judgment of the United States of America, as mentioned in subparagraph B of this paragraph IV.

V

A. The judgment hereinabove rendered in favor of the plaintiff United States of America is hereby declared, decreed, and ordered to constitute a first and paramount lien upon all of the personal properties, monies, deposits, and choses in action, owned by the defendant Westmoreland Manganese Corporation and upon which specific liens are *not* in this decree awarded to others, including all of such items presently itemized and inventoried by the Receiver, and including the full amount of the deposit heretofore turned over to the Receiver by the Arkansas Power and Light Company but not limited thereto.

B. All of the defendants, with the exception of the Westmoreland Manganese Corporation, and all of the intervenors herein, shall participate *pro rata*, according to the amounts of their judgments, in the surplusage from the sale of the properties described in subparagraph A of this paragraph V, if, in fact, there be any surplusage over and above the amount necessary to satisfy the judgment of the plaintiff United States of America.

VI

If the judgments awarded in paragraph I hereof, or any of them, together with interest and costs of this action, be not paid within thirty days from this date, the Special Master, hereinafter named, shall, after he shall have advertised the time, terms, and place of sale for thirty days by publication in some newspaper in Independence County, Arkansas and Izard County, Arkansas, each having a bona fide circulation in said counties, by at least four weekly insertions, sell, at some location determined by the said Special Master, the land and properties enumerated and described herein, provided, however, that no properties other than lands located in Izard County, Arkansas, as hereinabove described, shall be advertised in said newspaper published in Izard County, Arkansas, at public outcry to the highest bidder on terms of cash, or one-fourth cash, one-fourth in thirty days, one-fourth in sixty days, and one-fourth in ninety days; deferred payments to be evidence by notes bearing interest at the rate of six per

cent per annum, and secured by a bond with approved corporate surety. A lien shall be retained on said lands and properties further to secure the purchase price thereof; provided, that if any item of property is purchased by a party to this action having a first lien upon said item of property for an amount not in excess of the judgment hereinabove rendered in favor of said party, and costs, then the said party may, in lieu of giving bond, credit the amount of its bid, less the cost of this proceeding, upon the judgment herein rendered, at the time of the confirmation of such sale, which credit shall be an extinguishment of the said judgment to the extent of such credit, but provided further, that, if the party's said bid shall exceed the amount of its judgment, less costs, it shall be required to give bond only for the overplus. Provided, however, that all such parties hereto who purchase properties sold hereunder, using their judgments as a credit on the purchase prices thereof, shall obligate themselves by bidding upon said properties, to pay in cash their proportionate shares of the receivership costs and expenses and the costs and expenses of the Special Master incurred in conducting the sales, to the extent necessary to fulfill the provisions of paragraph IX hereof.

Upon a sale of the said lands and other properties and confirmation thereof by this Court, all the right, title, claim, interest, equity, or estate of the defendant Westmoreland Manganese Corporation, and of all parties to this action in and to said lands and other properties, and every part thereof, shall be, and the same is hereby, decreed to be forever barred and foreclosed; and it is further ordered that said sales, authorized herein, shall constitute a perpetual bar to all right of redemption and to all other right, title, claim, and interest of the defendant Westmoreland Manganese Corporation, and the other parties hereto, in and to all of the property described in the preceding paragraphs of this decree.

E. L. McHaney, Jr., Esquire, heretofore appointed Receiver *pendente lite* herein, shall continue as such, pending further orders of this Court, and the Court doth also hereby appoint the said E. L. McHaney, Jr., Esquire,

Special Master of and for this Court to execute this decree and to make the sales required herein, and report his actions hereunder to this Court.

VII

The Special Master hereinbefore appointed is hereby directed to sell and account for, separately, the properties of defendant Westmoreland Manganese Corporation, as follows: First, all of the personal property on which the plaintiff United States of America has a first and paramount lien, as set forth in paragraph V above; second, the different lots of personal property on which individual creditor-defendants have first liens, as set forth in paragraph IV above; third, properties described and enumerated in paragraph III above; fourth, the properties enumerated in paragraph II above.

Subject only to the requirements set forth in this paragraph VII and the publication of notice requirements set forth in paragraph VI above, and the requirements set forth in the "Memorandum Opinion Relative to Priority of Creditors' Claim" filed herein on September 24, 1955, the Special Master is authorized to group properties of similar types into items for convenient sale and shall offer properties item by item and in lots according to liens awarded in subparagraph A of paragraph IV hereof and sell same for the highest of the bids thus obtained. The Special Master is hereby given authority to advertise (in addition to the publication of official notice as set forth in paragraph VI above) in such trade channels or other publications as he shall deem necessary or advisable in order to inform prospective purchasers of the sales to be conducted hereunder, and to hire such personnel and to incur such other expenses as shall be necessary or expedient in carrying out the terms of this Decree.

VIII

The Special Master hereinabove appointed will sell the properties enumerated in this Decree in such a manner as to produce the highest possible return. The purchaser, or purchasers, of the improvements annexed to the realty

and enumerated in subparagraph A of paragraph III above will have the right to remove same within six months after the confirmation of said sales by this Court. The lands and interests in real property hereinbefore enumerated in subparagraph A of paragraph II above may be sold in parcels or in bulk, the only limitation on such sales being that the lands and interest in real property located in Izard County should be sold separately from the lands and interests in real property located in Independence County, and the proceeds of such sales shall be accounted for separately.

IX

From the proceeds of the sales of properties as herein ordered, together with any other funds available for distribution, the Special Master shall, first, pay the costs and expenses of said sales, and, second, shall reimburse the United States of America in the sum of $40,000.00, which said sum was advanced by the United States of America to the Receiver for defraying the costs and expenses of the receivership. The balance of said funds shall be distributed in accordance with the priorities provided in this Decree. If proceeds of all sales are sufficient to pay anything on the claims of unsecured creditors, this fact will be reported to the Court, who will then issue orders concerning the apportionment of the costs, fees, and expenses of the receivership and the costs, fees, and expenses of the Special Master. If, however, the proceeds of said sales are insufficient to pay anything on the claims of said unsecured creditors, such costs, fees, and expenses shall be pro rated among secured creditors who are parties hereto in the following manner, to wit:

Each secured creditor's *pro rata* share of the fund available for distribution shall be determined as if there were no costs, fees, or expenses. From each share thus determined, there shall be deducted that proportionate part of the costs and expenses, not charged as above, as such share bears to the total fund available for distribution to said secured creditors.

The Court retains jurisdiction of this cause for the purpose of making such further orders as may be necessary to effectuate the provisions of this Decree.

Dated this 25th day of October, 1955.

/s/ Harry J. Lemley
United States District Judge

NARRATIVE STATEMENT OF THE EVIDENCE

(Rule 10(b))

On this appeal by the Government no issue is raised as to the validity or amount of any of the money judgments against Westmoreland Manganese Corporation in favor of the various appellees, or as to the propriety of the sale of Westmorelands' assets which sale has already taken place. Rather the sole issue is whether the district court correctly held that appellees had miners' liens under Arkansas statutes and that such liens were entitled to priority in payment from the proceeds of the sale of the improvements erected on Westmoreland's property after execution of the Government's mortgages and from the proceeds of the sale of personal property which had been furnished by appellees for, but were not incorporated into the improvements. The issue is to be determined in the following factual background:

On April 7, 1952, the United States, acting through the Defense Materials Procurement Agency, and Westmoreland Manganese Corporation entered into a contract by which the Government agreed to purchase from Westmoreland over a seven-year period 264,000 long dry tons of Manganese ore which were to be mined from ore deposits owned by Westmoreland near Cushman, Arkansas, and processed in a washing and concentrating plant to be constructed within a year by Westmoreland on its property. To assist Westmoreland in its undertaking the United States agreed to advance to Westmoreland from time to time as needed sums of money not to exceed $3,807,250, of which up to $418,600 was to be used to pay off the balance

owing on the mining properties, up to $2,788,650 was to be used for the acquisition and completion of the new facilities, and up to $600,000 was to be used for working capital requirements of the new facilities. The Government advances were to be repaid by withholdings from the purchase price of the manganese or as delivered. As security for its advances the Government was to be given unencumbered and unqualified mortgages covering the new facilities and all mining properties then owned by Westmoreland, and the contract provided (paragraph No. 5(d)):

> The Government shall have a lien paramount to all other liens upon the credit balance in the special account or accounts in which the advance payments may be deposited, upon materials produced by you from the facilities, and upon all other assets.

On May 22, 1952, the Government advanced the sum of $418,600, which was used to pay off the balance owed by Westmoreland on its then owned mining properties. On the same day Westmoreland executed a promissory note for the sum of $3,807,250 payable to the order of the United States, and also executed a Real Estate and Chattel Mortgage and a Supplemental Mortgage. These instruments purported to mortgage to the United States all the property of Westmoreland, then owned or thereafter acquired, whether such property be real, personal or mixed. Among the provisions of the Real Estate and Chattel Mortgage are the following:

> This mortgage shall constitute a first lien on the mortgaged property.
>
> • • •
>
> That this mortgage and the lien thereof shall extend to any additional premises, property and rights hereafter acquired; and that all such premises, property and rights shall forthwith upon acquisition thereof, and without further act, become subject to this mortgage and the lien thereof.

The Supplemental Mortgage, which was described therein as being cumulative to the Real Estate and Chattel Mortgage, provided in part:

I

For the purpose of making more explicit the description of certain properties encumbered by said Real Estate and Chattel Mortgage, it is here acknowledged by Mortgagor that said Real Estate and Chattel Mortgage was intended to, and does grant, bargain, sell and convey to Mortgagee:

• • •

(B) The manganese washing and concentrating plant (of an estimated daily capacity of six thousand long tons) which is to be constructed by Mortgagor and located in Independence County, Arkansas, approximately seven miles from the town of Cushman, at or near the site of the present plant mentioned in (A) aforesaid, together with all buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, slime pond facilities, sidings, switch tracks and all other machinery, equipment and personal property (including office equipment and automotive equipment) at any time hereafter comprising said plant, or used by Mortgagor in connection with the operation of said plant, or held or acquired by it for possible use in such respect.

(C) All other machinery, equipment and personal property (whether similar or dissimilar to any of the foregoing), wherever located, now owned by Mortgagor or at any time hereafter acquired by it.

• • •

IV

It being understood that the cost of constructing the proposed manganese washing and concentrating plant (to be erected as provided in Paragraph (B) of Subdivision I aforesaid) is to be paid

> out of the proceeds of the advances to be made by Mortgagee to Mortgagor as hereinabove set out, it is understood (and notice is hereby given) that the lien of the Mortgagee under said Real Estate and Chattel Mortgage and under this Supplemental Mortgage upon said manganese washing and concentrating plant (and the site thereof) will take priority over the lien of any mechanic, materialman or laborer or any other statutory lien.

Both mortgage instruments were executed, acknowledged and recorded so as to comply fully with all requirements of the law of Arkansas. At the time of their recordation Westmoreland had no debts, other than that owing to the United States, which could be the basis for an encumbrance of its property.

Subsequently, Westmoreland began the construction of the new facilities contemplated by the contract and acquired much equipment for carrying on mining operations on its lands. And up to February 14, 1953, the United States advanced to Westmoreland the sum of $2,877,006.50. On or about February 21, 1953, the Government refused to countersign several checks drawn by Westmoreland on its special bank account, said refusal being on the ground that there were overruns in the categories of the construction account to which the checks were to be charged. Thereupon all construction operations were brought to a halt and have never been resumed. At that time the new plant was about eighty or eighty-five percent complete, and it had been determined that it could not be completed with the moneys that the Government had agreed to advance for that purpose, but that approximately $545,000 more would be needed. Creditors other than the Government but including appellees herein, held claims of over $370,000 for materials and services furnished to Westmoreland in connection with the construction of the new facilities contemplated in the contract of April 7, 1952.

On March 5, 1953, Westmoreland applied for the advance of a sum $545,800 in excess of the amount which the Government had agreed to advance for construction of

the new facilities, such sum being estimated as necessary for the payment of creditors and completion of the new facilities. On April 2, 1953, while that application was pending and just five days before Westmoreland was required under the contract of April 7, 1952, to have its plant completed and to be in production at a specified rate, Westmoreland and the United States executed an amendment to the contract. This amendment provided that the facilities should be placed in a temporary standby condition and that all operations should cease except for the continuation of a mineral drilling program. The Government agreed to make available funds for the payment of the costs of the drilling program and of maintaining the facilities in a standby condition. On condition that Westmoreland raised $15,000, the Government agreed to make available a sum not to exceed $29,080.42, the total to be used to pay accrued wages to Westmoreland's employees. The amendment also provided:

> 3. Notwithstanding any provision in the Contract to the contrary, the Contractor hereby grants to the Government the unqualified right and privilege of terminating the Contract at any time in the future up to commencement of production upon determination by the Government that termination of the Contract is in the best interest of the Government; the Contractor shall take no legal action to prevent such termination of the Contract by the Government, and disclaims any and all recourse by reason of such termination by the Government.

By the amendment Westmoreland waived the sixty-day period granted by the mortgage within which to remedy a breach of the contract provisions, and agreed that all moratorium provisions contained in the mortgage were without force and effect, and that upon termination of the contract it would grant immediate possession of the facilities to the Government. More than $75,000 was advanced by the Government under the provisions of the amendment, bringing its total advances to Westmoreland to more than $2,877,081.

On October 29, 1953, the United States terminated the Westmoreland contract and demanded possession of the facilities. When its demand was refused, the Government on January 8, 1954, filed this action to recover judgment against Westmoreland for the amount of its advances and to foreclose its mortgages. Upon motion by the United States for the appointment of a receiver *pendente lite*, the district court found as a fact that Westmoreland was insolvent, appointed a receiver, and ordered that said receiver take possession of all property of Westmoreland, whether real, personal or mixed. There was no appeal from that order. After trial, the district court adjudged that the United States was entitled to a money judgment and to foreclosure, and the correctness of the judgment in these respects is the subject of an appeal (No. 15,500) by Westmoreland. On this appeal, as has already been indicated, the Government seeks review only of those portions of the decree adjudging that, as to some of Westmoreland's property (i.e., the partially completed washing and concentrating plant and materials furnished for such plant, but not incorporated therein) the liens of appellees were superior to the lien of the Government's mortgages.

Prior to or during the trial the United States and appellees stipulated as to the amounts and the validity of appellees' respective claims against Westmoreland, and it was agreed that appellees had timely and properly asserted and preserved their claims for liens in accordance with the procedure prescribed by the Arkansas statutes. It was also stipulated that some materials furnished by certain appellees (Mill & Mine Supply Company, General Steel Products Company, Choctaw, Inc., Crow-Burlingame, Inc., Arkansas Foundry Company, Jeffery Lumber Company, and Padgett Lumber Company), although sold and delivered for use in the construction of the new facilities, were never incorporated into the improvements, but were stored at the plant site. By said stipulations none of the parties waived their claims of priority of liens, but stood on the allegations of their respective pleadings as to such priority.

With respect to Latrobe Construction Company, which held the contract for the actual construction of the washing and concentrating plant, this appellee did not furnish any materials used in the contruction, and its claim is based upon supplying labor, i.e., the payment of wages. The materials worked upon by Latrobe's employees were furnished by Westmoreland through suppliers including the other appellees.

Appellee Bragg's Electric Construction Company held the contract for electrical work on the Westmoreland project. As found by the district court, this appellee furnished both labor and materials. Under its contract, Bragg's employees performed much labor in installing and activating pumps, motors and other electrical equipment which Bragg's did not supply.

NOTICE OF APPEAL

(Filed in U. S. District Court on December 23, 1955)

The appellant in this case is the United States of America.

The attorney for appellant is Osro Cobb, United States Attorney for the Eastern District of Arkansas, 418 Federal Building, Little Rock, Arkansas.

The District Court on October 25, 1955, entered a judgment in this cause favorable in most respects to the contentions of this appellant. However, the judgment does give certain claimants under the Arkansas Miners' Lien Statute priority as against the United States as to certain assets of the defendant Westmoreland Manganese Corporation. This portion of the judgment is adverse to the United States and is the subject of this appeal.

An appeal from said judgment of October 25, 1955, is hereby taken by the United States of America, appellant, to the United States Court of Appeals for the Eighth Circuit.

UNITED STATES OF AMERICA

By /s/ Osro Cobb

United States Attorney for the

Eastern District of Arkansas

Dated December 23, 1955

RELEVANT DOCKET ENTRIES

Jan. 8, 1954	Complaint filed
Jan. 27, 1954	Hearing on Petition for Appointment of Receiver at Little Rock, before Lemley, J., at 9:30 a.m.
"	Findings of Fact and Conclusions of Law filed.
Feb. 23, 1954	Separate Answer and Cross-Complaint of Arkansas Foundry filed
"	Separate Answer and Cross-Complaint of Crow-Burlingame filed
"	Separate Answer and Cross-Complaint of Mill & Mine Supply Co. filed
Feb. 25, 1954	Separate Answer and Cross-Complaint of Padgett Lumber Co. filed
"	Separate Answer and Cross-Complaint of General Steel filed
"	Separate Answer and Cross-Complaint of Ira Sherrill filed
"	Separate Answer and Cross-Complaint of Choctaw, Inc., filed
"	Separate Answer and Cross-Complaint of Jeffery Lumber Co. filed

Mar. 1, 1954	Separate Answer and Cross-Complaint of Bragg's Electric Co. filed
Mar. 3, 1954	Separate Answer and Cross-Complaint of Latrobe Construction Co. filed
June 21, 1954	First Amendment to Complaint filed, with certificate of service
Oct. 27, 1954	Second Amendment to Complaint filed
Jan. 21, 1955	Government's Consolidated Reply to Creditor-Defendants' Answers filed, with certificate
Sept. 24, 1955	Memorandum Opinion filed relative to priority of Creditors' claims
Oct. 25, 1955	Decree filed in accordance with Court's Memorandum of June 30 and Aug. 1, 1955
Dec. 23, 1955	Notice of Appeal filed by Government. Copies to counsel by clerk
Jan. 17, 1956	Order filed, granting Government's Motion until March 23, 1956, to docket appeal